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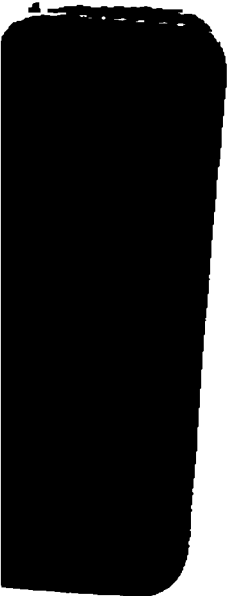
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THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1860.

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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AMERICAN DECISIONS.
VOL. LXXIII

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

BOWEN v. JOHNSON.

[5 RHODE ISLAND, 112.]

PROBATE OF WILL IN ANOTHER STATE IS ONLY PRIMA FACIE EVIDENCE OF ITS VALIDITY, upon an application to a probate court in Rhode Island to allow a copy thereof to be filed and recorded in the latter state.

SECTION 1 OF ARTICLE 4 OF CONSTITUTION OF UNITED STATES DOES NOT EXTEND OPERATION OF DECREE OF PROBATE COURT admitting a will to probate to things which were, at the time of the testator's death, without the territory of the state whose court has taken the probate.

PROBATE COURT HAS POWER TO REVOKE PROBATE OF FORMER WILL upon a mere application to it to prove, or to allow to be filed and recorded, a later will of the same testator, as incidental thereto, and it is not necessary to institute a preliminary and separate proceeding for the purpose of such revocation before applying for the probate of such later will.

APPEAL from a decree of the court of probate of the town of Warren, refusing to allow a paper, purporting to be an exemplified copy of the will of William Bowen, to be filed and recorded as and for the last will and testament of said testator. It appeared on the trial that said William Bowen, deceased, left two wills. The earlier of said wills was admitted to probate on the sixth day of May, 1854, by said probate court of Warren. The later will was admitted to probate on the nineteenth day of May, 1854, by the surrogate of Cayuga county, New York. A duly authenticated copy of said later will and of the surrogate's decree, admitting it to probate, was presented to the court, and claimed to be conclusive proof of its validity by force of article 4, section 1, of the constitution of the United States. To bring the questions involved in the case before the full court upon a motion for a new trial, the presiding judge

ruled *pro forma* that the New York decree was not conclusive of the validity of the later will, and that direct proceedings must first be instituted to revoke the probate of the earlier will and the letters granted by the probate court of Warren. The jury found a verdict in accordance with these rulings, and the appellant moved for a new trial upon the ground of misdirection.

Bradley and James R. Cox, for the motion.

R. W. Greene, contra.

By Court, AMES, C. J. This cause comes before us, upon a motion for a new trial, for the decision of two questions which are raised by it: 1. Whether, as a matter of practice, a subsequent will, made and admitted to probate in another state, can be allowed to be filed and recorded here, without first revoking the probate of a prior will of the same testator, made by a court of probate in this state; and 2. Admitting that this may be done, whether the probate of the later will in another state, though taken subsequently to the domestic probate of the prior will of the same testator, is conclusive evidence of the validity of such later will, by force of article 4, section 1, of the constitution of the United States. The appellant contends that both these questions should be decided in the affirmative, notwithstanding the apparent inconsistency of holding that a domestic decree of probate, unrevoked and unappealed from, is of no force to hinder a judicial act in derogation of it, whilst a foreign decree of probate is conclusive, and its merits cannot be inquired into for the purpose of ascertaining whether a foreign will shall be filed and recorded here, so that it may operate upon real and personal estate within the jurisdiction of this state at the time of the death of the testator.

We propose to consider first the second of the above questions, as first in order of importance.

It is certain that our statute concerning the probate of wills, R. S., c. 155, secs. 5-10, does not proceed upon the supposition that a foreign probate, or the probate of a will in another state, which are placed by it upon the same footing, are conclusive as to the validity of the will here, as a will either of real or personal estate; but, on the contrary, supposes that neither is of any force to operate upon property here, except so far as the statute accords it to them. In this respect our legislature pursues the course of legislation common, we believe, to nearly all the states, of making the extraterritorial probate *prima facie* evidence only of the due execution of the extraterritorial will,

when proper proceedings are instituted here for its allowance and record; leaving it for those who, upon the notice issued, appeared to object to the will, to show cause, if any they have, against the filing and recording of the same.

We have already had occasion to consider in the case of *Olney v. Angell*, 5 R. I. 198, a case argued since but decided before the case at bar, the nature and effect of the probate of a will in a foreign court or in the court of another state, when the will is introduced here as evidence of title to things within this state at the death of the testator; and see no reason to change our conclusion in that case, in application to a direct proceeding like this to give sanction and operation here to a will so proved, except so far as the statute authorizing the proceeding may require. The probate of a will is unlike a judgment between parties subject to the jurisdiction of the court rendering it, in this: that being but a decree *in rem*, usually passed upon constructive notice only, it is confined in its operation to things within the state setting up the court which takes the probate. It has been so treated, as we have seen, in the country from which we derive our jurisprudence, and in general, at least, by the courts and legislatures of our own. "Full faith and credit" is given to it abroad, when the same faith and credit is given to it which it has at home; and that is, that it is to be conclusive evidence of the validity of the will, as affording title to things within the jurisdictional limits of the court at the death of the testator, whether such title comes in contest within or without those limits; but, *de jure*, no evidence whatever of title to things not then within those limits. The clause of the constitution of the United States referred to was not designed to extend the jurisdiction of local courts, or to extend beyond its just limits the operation of a local decree. But to provide a mode of authenticating evidence of the record of a judicial proceeding had in one state, so that the proper general result of it might be conveniently attained in every other state, against persons and things justly within the range of the proceeding. Notwithstanding this clause, a judgment in a suit between parties is, as such, void out of the state, as to parties not personally served, and not appearing to defend within the state whose court renders the judgment; although if the suit be commenced by attachment of things within the state, it is, without such service or appearance, good as a judgment *in rem* against those things, to condemn them to satisfy the judgment. As little does this constitutional provision extend the jurisdiction of a municipal court

of probate to things beyond the limits of the state which sets it up, and is quite satisfied, in our judgment, "with leaving the probate of a will where it finds it, a decree local in its nature and operation:" *Olney v. Angell*, 5 R. I. 198.

Upon this ground, therefore, we cannot grant a new trial of this appeal.

With regard to the question of practice, the *pro forma* ruling of which adversely to the appellant affords the other ground of his motion for a new trial, we feel at liberty, in the absence of any authority binding upon us, to decide it in the mode which, considering our circumstances, will the most directly lead to just results with the least inconvenience to parties litigant. Our statutes nowhere recognize in express terms the power of our courts of probate to revoke a probate once granted by them; leaving that just and necessary power to be implied from their general power to "take the probate of wills, and grant administration on the estates of deceased persons:" R. S., c. 151, secs. 3, 4. No one can suppose, however, that such power of revocation does not exist in them; else if probate of a will be granted, and the time of appeal be passed, inasmuch as their jurisdiction is exclusive, there would be no mode in which a later will of the testator, subsequently found, could be proved, without the inconvenience of having out, at the same time, conflicting authorities issuing from the same source, and with regard to the settlement of the same estate. Now, it would seem to be quite congruous with the statute mode of conferring this power of revoking the old probate, to wit, as incidental to the power of taking probate of the later will when discovered, for the court to exercise this power of revocation, as incidental to the new grant of probate, rather than to make it necessarily the subject of preliminary and separate action. Such a practice would save the delay and expense of double proceedings, and enable the court to revoke or modify the old probate, as the old will utterly conflicted, or was capable of partially standing with the new one. Notice of the petition for the probate, or for filing and recording of the new will, must necessarily be given to the parties interested under the old one; and the prayer of such a petition incidentally involves the revocation of the probate of the will of prior date, so far as such will conflicts with the provisions of the will of later date. We can perceive no danger of confusion or injustice in allowing this double but dependent duty to be performed by the court upon a mere petition for the probate of the later will; and its simplicity and

directness commend it, as a matter of practice, in other respects, to our favor.

Without doubt, the probate of the first will must stand as conclusive upon courts of common law and chancery, until revoked by proper proceedings in the appropriate court, as decided in *Annesley v. Palmer*, 9 Mod. 8; and in *Allen v. Dundas*, 3 T. R. 125, 129; *Prosser v. Wagner*, 38 Eng. L. & Eq. 201, 205; and the practice in the English ecclesiastical courts probably is not, in general, to grant probate of the later will until service of a citation, calling upon the executor of the prior will to bring it in for revocation. Yet this rule of practice is amenable to circumstances; and in the late case of *Wilkinson v. Robinson*, 14 Jur. 72, probate of the later will was taken by the prerogative court, notwithstanding a decree ordering the executrix of the former one to bring it in, in order that the probate of it might be revoked, and that probate of the second will might be granted, could not be served upon her—she residing in France, and avoiding service of the decree. The cases of *Campbell v. Logan*, 2 Bradf. 90, and of *Schultz v. Schultz*, 10 Gratt. 358 [60 Am. Dec. 335], cited by the appellant, are not only in point as to the exercise by courts of probate of the power of revoking the probate of a former will, as incidental to taking probate of a later one of the same testator, under legislation similar to our own, but, as we understand them, to do this upon a mere application to prove the later will. Without deciding, therefore, that such power of revocation may not be exercised upon a direct application to the court for that purpose, we have come to the conclusion that it may be exercised upon a mere application to take probate of, or to allow to be filed and recorded a copy of, the later will, as incidental thereto; and that upon the ground of misdirection in this particular, a new trial must be granted to the appellant in this cause.

EFFECT OF WILL ADMITTED TO PROBATE IN ANOTHER STATE.—The question of the conclusiveness of orders and decrees of probate courts admitting wills to probate is discussed in the note to *Schultz v. Schultz*, 60 Am. Dec. 353 et seq. The judgment of a probate court admitting a will to probate is generally regarded as in the nature of a judgment *in rem*, conclusive upon all the world. Said Shaw, C. J., in delivering the opinion of the court in *Crippen v. Dexter*, 13 Gray, 330, 332: "The judgment of a probate court, allowing proof of a will and admitting it to probate, is to some extent like a proceeding *in rem*, binding upon the rights of all persons interested in the property to be administered, though they are not named as parties. In this respect, therefore, the final judgment of a court having jurisdiction of the subject-matter may be rightly held to be conclusive. . . . As to all those facts which are necessary to the establishment of a will, in whichever form

the case is entertained, and as to the regularity of the proceedings and their conformity to the law of the state or country where they are had, the judgment itself must be held conclusive; it is required by the rule of the constitution of the United States, which requires that the acts and judicial proceedings in one state shall be respected in the courts and tribunals of others; and by the rule of the common law, giving effect to judgments of other states, where they have a peculiar jurisdiction in case of proceedings *in rem*, and have custody of the subject-matter." The difficulties that would necessarily arise from the adoption of any other rule were forcibly stated by Mr. Justice Story in the case of *Tompkins v. Tompkins*, 1 Story, 552. "The reason is, that it being the sentence or decree of a court of competent jurisdiction, directly upon the very subject-matter in controversy, to which all persons who have any interest are, or may make themselves, parties, for the purpose of contesting the validity of the will, it necessarily follows that it is conclusive between those parties. For otherwise, there might be conflicting sentences or adjudications upon the same subject-matter between the same parties; and thus the subject-matter be delivered over to interminable doubts; and the general rules of law, as to the effect of *res judicata*, be completely overthrown. In short, such sentences are treated as of the like nature as sentences or proceedings *in rem*, necessarily conclusive upon the matter in controversy for the common safety and repose of mankind." And by Lord Chancellor Westbury in *Emohin v. Wylie*, 10 H. L. Cas. 15. "The utmost confusion must arise if, when a testator dies domiciled in one country, the courts of every other country in which he has personal property should assume the right, first of declaring who is the personal representative, and next of interpreting the will and distributing the personal estate situate within its jurisdiction according to that interpretation. . . . It is unnecessary to dwell on the evils which would result from this conflict of jurisdictions. It was to prevent them that the law of the domicile was introduced and adopted by civilized nations."

But although the judgment of a court of probate proving a will is conclusive upon all other courts elsewhere until reversed, the authority of the executor appointed by that court is confined to the jurisdiction of the court by which he is appointed. An ancillary probate, therefore, becomes necessary in order to give effect to a foreign probate, when it is required to have it operate beyond the jurisdiction of the domicile of the testator. Whenever this ancillary probate is sought, if the probate in the testator's domicile was granted by a court of competent jurisdiction and is properly authenticated, the ancillary probate is generally allowed as a matter of course, and without inquiry into the validity of the will or the sufficiency of the proofs upon which the court granting the original probate acted. This doctrine is firmly established in England and in a majority of the courts in the United States, as well as by the supreme court of the United States: *Whicker v. Hume*, 7 H. L. Cas. 124; *In the Goods of Cosnahan*, L. R. 1 P. & D. 183; S. C., 35 L. J. P. 76; *Miller v. James*, L. R. 3 P. & D. 4; *Brock v. Frank*, 51 Ala. 89; *Goodman v. Winter*, 64 Id. 410; *Apperson v. Bolton*, 29 Ark. 418; *St. James's Church v. Walker*, 1 Del. Ch. 284; *Shephard v. Carriel*, 19 Ill. 313; *Gardner v. Ladue*, 47 Id. 211; *Newman v. Willets*, 52 Id. 98; *Harris v. Harris*, 61 Ind. 117; *Succession of Hall*, 28 La. Ann. 57; *Dublin v. Chadbourn*, 16 Mass. 433; *Parker v. Parker*, 11 Cush. 519; *Crippen v. Dexter*, 13 Gray, 330; *Lem's Will*, 1 Tuck. 20; *Russell v. Hartt*, 87 N. Y. 19; *Carpenter v. Denoon*, 29 Ohio St. 379; *Williams v. Saunders*, 4 Coldw. 60; *House v. House*, 16 Tex. 598; *Markwell v. Thorne*, 28 Wis. 548; *Hayes v. Lienlokken*, 48 Id. 509;

Gaines v. New Orleans, 6 Wall. 642. Sir J. Hannen, in delivering the opinion in *Miller v. James*, L. R. 3 P. & D. 4, said: "It is the established practice that, where a will has been proved in a foreign court, a duly authenticated copy will be admitted to probate in this country, without further evidence of the validity of the will, as it is presumed that the foreign court has been satisfied on that point. . . . The court here is not entitled to take upon itself to determine whether the court of the place of domicile has adopted sufficient means to investigate the validity of wills to which it has given its official sanction."

So Brickell, C. J., in delivering the opinion of the court in *Goodman v. Winter*, 64 Ala. 426, said: "In the absence of statutory provisions, the sentence of probate in the proper tribunal of the domicile of the testator is conclusive everywhere of the capacity of the testator, and of the due execution and validity of a will of personal property. No other tribunal, foreign or domestic, will indulge an inquiry behind or beyond it. When the probate is to operate in another jurisdiction, ancillary probate may be necessary; but the only inquiry then made is as to the validity and due authentication of the original probate. Ascertaining that to have been granted by a court of competent jurisdiction, and to be properly authenticated, ancillary probate is a matter of right."

And Mr. Justice Davis, in delivering the opinion of the court in *Gaines v. New Orleans*, 6 Wall. 703, said: "When a will is duly probated by a state court of competent jurisdiction, that probate is conclusive of the validity and contents of the will in this court."

And Brickell, J., delivering the opinion of the court in *Brock v. Frank*, 51 Ala. 89, referring to a decree admitting a will to probate, said: "The decree is not only evidence, but it is conclusive and final. No other tribunal will re-examine or permit to be drawn in litigation the validity or invalidity of the will." It will be seen from an examination of the cases above cited, and from the extracts quoted therefrom, that the court, in the principal case, and also in the case of *Olney v. Angell*, *post*, p. 62, referred to in the principal case, gives to the decree of a court of probate of another state proving a will a more limited effect and operation than is accorded to it by the majority of the English and American courts. And the American cases show that the courts of this country have been inclined to give a much more liberal and extended effect to section 1 of article 4 of the constitution of the United States, so far as it affects such decrees of probate courts, than does the court in the principal case, and in the case of *Olney v. Angell*, *supra*. Said Brickell, J., delivering the opinion of the court in *Brock v. Frank*, 51 Ala. 90: "When the will and probate is presented for probate here, the only inquiries the court of this state can make are, whether the foreign probate was granted by a court having jurisdiction, and whether the will and probate is properly authenticated. Ascertaining these facts, the duty of the court then becomes ministerial, not judicial, and that duty is the record of the will and probate. The law intervenes and attaches to the probate not only the faith and credit it commanded within the jurisdiction pronouncing the sentence, but the value and dignity of a domestic decree of probate." In the case of *Melvin v. Lyons*, 10 Smed. & M. 78, it was decided that a copy of a will which has been duly probated in any state in the Union is admissible in evidence in Mississippi, when certified according to the act of congress of May 26, 1790, prescribing the mode in which public acts, records, and judicial proceedings in each state shall be authenticated, so as to take effect in every other state.

WHERE TESTATOR WAS NOT DOMICILED IN FOREIGN STATE AT TIME OF HIS DEATH, an authenticated copy of his will and the probate thereof in that state cannot be admitted to probate in the state in which he was domiciled at the time of his death. In such a case, the court rendering the decree admitting the will to probate had no jurisdiction of the subject-matter; and as the court had no power to make the record, the courts of the state where the testator had his domicile at the time of his death are not bound to receive the authenticated copy of such record: *Sturdivant v. Neill*, 27 Miss. 157; *Morris v. Morris*, Id. 847; *Bate v. Incisa*, 59 Id. 513; *Stark v. Parker*, 56 N. H. 481; *Alexander's Will*, 1 Tuck. 114; *Whicker v. Hume*, 7 H. L. Cas. 124. In a case of that kind, it seems the original will itself must be produced in the court of the state where the testator's actual domicile was at the time of his death: *Alexander's Will*, 1 Tuck. 114. A grant of probate of a will in another jurisdiction is not conclusive evidence of the domicile of the testator at the time of his death: *Whicker v. Hume*, 7 H. L. Cas. 124. In *Sturdivant v. Neill*, 27 Miss. 157, it was held that the Mississippi statute in relation to the admission to probate within that state of authenticated copies of wills proved according to the laws of the United States or territories, or of foreign countries, is not applicable to wills made by citizens domiciled in Mississippi, but only to wills made according to the laws of some other state or country by persons domiciled therein at the time of their death.

CONCLUSIVENESS OF PROBATE AS TO REALTY.—But while, as we have shown, the decree of the court of the testator's domicile admitting the will to probate is generally conclusive as to his personalty, wherever situated, it is not so, generally, as to the realty: See note to *Schultz v. Schultz*, 60 Am. Dec. 360, where this subject is discussed. In the absence of statutory provisions on the subject, the probate of a will does not affect the question of the application of the will to real estate, unless the will was executed and recorded according to the requirements of the law of the place where the real estate is situated: Freeman on Judgments, sec. 608; Wharton's Conf. L., sec. 645; Story's Conf. L., sec. 474. In several of the states, however, decrees of probate are as conclusive as to real estate as they are as to personalty. And the tendency of recent legislation is to do away with all distinctions between wills of personalty and wills of real estate.

STATUTORY PROVISIONS AS TO EFFECT OF WILLS PROBATED IN OTHER STATES.—The effect to be given to a will admitted to probate in another state is regulated almost entirely by statute in the several states. There is one respect in which nearly all the statutes agree, and that is, that when a duly authenticated copy of a will and of the probate thereof in another state or country is once admitted to probate or to record in the court of the state where it is produced, it has the same force and effect given to it there that it would have if it had been originally admitted to probate in that state. We give below the provisions of the statutes of the several states bearing upon the question under consideration.

Alabama.—In Alabama, when an authenticated copy of the will and of the probate thereof is presented, no contestation of the validity of the will is now allowed, but the will so authenticated must be admitted to probate and record: *Ward v. Oates*, 43 Ala. 515; *Brock v. Frank*, 51 Id. 85; *Goodman v. Winter*, 64 Id. 410. The rule in this respect was changed by the legislature subsequent to the decision in the case of *Varner v. Bevil*, 17 Id. 286, where it was held that when a duly authenticated copy of a will and probate thereof in another state was offered for probate and record in Alabama, the probate thereof might be contested on the same grounds as that

of a will originally offered for probate in Alabama. In this state a will is equally conclusive as to real and personal estate: *Brock v. Frank*, 51 Id. 85.

Arkansas.—In this state a will executed and admitted to probate in another state is, after it has been admitted to probate and recorded in Arkansas, as effectual to pass real estate situated in Arkansas as if it had been originally made and admitted to probate there: *Apperson v. Bolton*, 29 Ark. 418.

California.—In this state, when a copy of the will and the probate thereof duly authenticated is produced by the executor or by any person interested in the will, with a petition for letters, the court must appoint a time for the hearing, of which notice must be given the same as for an original petition for the probate of a will. "If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state:" Cal. Code Civ. Proc., sec. 1324. The law of Dakota territory is the same as that of California in this respect: Dak. Prob. Code., secs. 28-30.

Colorado.—In Colorado, a certified copy of the will and probate thereon duly authenticated, as required by the act of congress, entitles the will to be admitted to probate and to be recorded in this state, without further proof of the execution thereof, and without notice, and letters may issue thereon as in other cases: Col. Gen. Stats., p. 1026, sec. 27 (1883).

Connecticut.—All wills executed according to the laws of the state or country where they were made may be admitted to probate in this state, and are, when so admitted, effectual to pass any estate of the testator situated in Connecticut: Conn. Gen. Stats., p. 369, c. 11, sec. 2 (1875).

Delaware.—The foreign probate of a will is not conclusive as to lands in Delaware, but may be controverted: *Pennel v. Weyant*, 2 Harr. (Del.) 501. But a will of personalty executed in conformity with the law of the testator's domicile and admitted to probate there will, when admitted to probate in the proper court in Delaware, pass the title to the devisee, although such will was not executed according to the law of Delaware: *St. James Church v. Walker*, 1 Del. Ch. 284.

Florida.—The Florida statute gives to the foreign will, when admitted to probate in that state, the same effect as a Florida will, provided it was executed with the formalities required by the law of Florida: McClellan's Dig. L. of Fla., p. 987, sec. 8 (1881).

Georgia.—A copy of a will and probate thereof in another state is, when duly authenticated, admissible in evidence in the courts of Georgia, without being admitted to probate in Georgia: Ga. Code, sec. 2433; *Doe v. Roe*, 31 Ga. 593. This is also the law in Illinois: *Shepard v. Carriel*, 19 Ill. 313; *Gardner v. Ladue*, 47 Id. 211; *Newman v. Willette*, 52 Id. 98. And in North Carolina: *Lancaster v. McBryde*, 5 Ired. L. 421.

Illinois: See under Georgia, *supra*.

Indiana.—If on an application for the probate of a duly authenticated copy of a foreign will and probate the Indiana court is satisfied that the instrument ought to be allowed, it shall order it filed, and it shall then have the same effect as a will originally admitted to probate in that state: Ind. R. S., secs. 2591-2593 (1881). But a foreign will, or a copy of the probate thereof, cannot be used as evidence in the courts of Indiana, unless the same has been produced to the proper court in Indiana, and by that court directed to be

filed and recorded: *Thieband v. Sebastian*, 10 Ind. 454; *State v. Joyce*, 48 Id. 310; *Pitts v. Melsner*, 72 Id. 469. It seems that when a duly authenticated copy of a foreign will is offered for probate in the courts of Indiana the probate thereof cannot be contested: *Harris v. Harris*, 61 Id. 117.

Iowa.—The Iowa statute provides that a duly authenticated foreign will and probate shall have the same effect as wills made and proved in Iowa. No notice of the probate in Iowa need be given, but probate there must be had: 1 Iowa Rev. Code, p. 610 (1880).

Kansas.—In Kansas an authenticated copy of a foreign will and the probate thereof is admitted to probate upon hearing and notice, and when admitted, has the same force and effect as a will originally admitted to probate in Kansas: *Dass. C. L. of Kan.*, c. 117, secs. 24–28 (1881). Substantially, the same law is in force in Michigan, Minnesota, and Nebraska: 2 Mich. C. L., p. 1375; *Minn. Stats.*, c. 47, secs. 18–21 (1878); *Neb. Gen. Stats.*, c. 17, secs. 144–148 (1873).

Kentucky.—A judgment or order of a foreign court of probate admitting a will to probate is sufficient to authorize an authenticated copy of such will to be admitted to record in Kentucky as a will of personalty. But in order to entitle the will to pass real estate, the foreign transcript must also show that the evidence heard on the probate, if offered in Kentucky, would authorize the probating of the will in the latter state as a will of real estate: *Williams v. Jones*, 14 Bush, 418; *Ky. Gen. L.*, c. 113, sec. 30. In the case of *Williams v. Jones*, *supra*, it was held that a will probated in Tennessee, relating to lands in Kentucky, was ineffectual as a will of real estate in Kentucky because the transcript did not show that the name of the testator was subscribed to the will by himself, or by another by his direction, in the presence of the subscribing witnesses. It was also said in that case that foreign wills are admitted by comity, and not of right; and that a proceeding for the probate of a will did not come within the meaning of section 1 of article 4 of the constitution of the United States. Foreign wills may be admitted to record in the clerk's office of the circuit court in this state, without probate in Kentucky, on a proper authentication of the foreign probate; and when so recorded, they have the same effect as if originally proved and recorded in the proper county there: *Sneed v. Rhwing*, 5 J. J. Marsh. 460; S. C., 22 Am. Dec. 41; *Robertson v. Barbour*, 6 T. B. Mon. 523. A will proved in Virginia before the separation of Kentucky from the former state may be admitted in evidence in Kentucky: *Morgan v. Gaines*, 3 A. K. Marsh. 613; *Gray v. Patton*, 2 B. Mon. 12.

Louisiana.—In order to give effect to a testament made in another state on property situated in Louisiana, the testament must be registered and its execution ordered by the judge having jurisdiction over the place where the property is situated: *Dixon v. D'Armond*, 23 La. Ann. 200. But the civil code, article 1689, provides that the order of execution shall be granted without any other form than that of registering the testament, if it be established that the testament has been duly proved before a competent judge of the place where it was received: *Succession of Hall*, 28 Id. 57.

Maine.—The foreign will and probate thereof duly authenticated, when admitted to probate in Maine, has the same effect as if it had been originally admitted to probate there, provided it was executed in accordance with the law of Maine: *Me. R. S.* 538, c. 64, secs. 13, 14 (1884). When the copy of a will and probate in another state is duly filed in the proper court in this state, it has relation back to the time of the testator's death: *Howey v. Deane*, 13 Me. 31.

Maryland.—The present law of Maryland on the subject under consideration is as follows: "Any person who may be interested in any devise or bequest of any property within the limits of this state, or that may be brought into this state after the bequest contained in any will admitted to probate and recorded in any other state or territory of the United States, or in any foreign country, may procure a copy of said will, with a copy or certificate of the probate thereof, authenticated in the mode and by the officer duly authorized therefor by the laws of such state, territory, or foreign country, and file the same in the office of the register of wills of any county in this state, or the city of Baltimore; and thereupon it shall be the duty of said register to record the same as other wills admitted to probate in his office; and a copy of any record which has heretofore been made or shall hereafter be made as hereinbefore provided, certified under the hand of said register and the seal of his office, shall be evidence in all suits and actions to be tried by any court in this state, or before any justice of the peace, wherein the title to any property, real or personal, thereby devised or given, shall be in question with the same force and effect as if the original will had been admitted to probate in this state, according to the laws thereof." Laws of Md., 1882, p. 431, c. 285. See *Budd v. Brooks*, 3 Gill, 198; S. C., 43 Am. Dec. 321; *Beatty v. Mason*, 30 Md. 409. In the latter case it was held that the copy of the will recorded with the register is subject to the same exceptions as other wills of record, and that a party claiming against it is not precluded from showing that it was not properly authenticated, and should not, therefore, have been recorded.

Massachusetts.—A decree of a probate court of another state, admitting to probate a will within its jurisdiction, is conclusive evidence, if duly authenticated, of the validity of the will, upon an application to prove it in this state; even when no notice of the offer of the will for probate was given, if by the law of that state no such notice was required: *Crippen v. Dexter*, 13 Gray, 230. Jackson, J., delivering the opinion of the court in *Dublin v. Chadbourne*, 16 Mass. 441, said: "When a will is originally proved and allowed in any other state or country, according to the laws of such country, the filing and recording of a copy in our probate court, in the manner prescribed by the statute, is of the same force and effect as if the original had been proved and allowed here:" See also *Parker v. Parker*, 11 Cush. 519. Decrees of probate courts in this state are conclusive as to realty as well as personalty: See note to *Schultz v. Schultz*, 60 Am. Dec. 360.

Michigan.—See under Kansas, *supra*. In order to entitle wills probated abroad to be admitted to probate in Michigan, the copy of the will presented must be accompanied by the foreign probate and due authentication thereof, and these together constitute the one instrument or subject-matter to be acted upon under the statute, and all are essential to authorize the probate court to exercise the jurisdiction: *Pope v. Cutler*, 34 Mich. 150. The record of a will with the proof of it and the letters issued thereon constitute the probate of it in New Jersey, and entitle a New Jersey will to be filed for probate in Michigan: *Wilt v. Cutler*, 38 Id. 189. Probate of a foreign will cannot be allowed under the Michigan statute, unless it is presented by an executor or other person interested in the will: *Besancon v. Brownson*, 39 Id. 388.

Minnesota. See under Kansas, *supra*.

Mississippi.—In this state the probate of the authenticated foreign will and probate may be contested the same as that of a will executed in Mississippi: Miss. Rev. Code, c. 9, sec. 1105 (1871). When the authenticated copy is admitted to probate in Mississippi, it is competent evidence there: *Mont-*

gomery v. Milliken, 5 Smed. & M. 151; S. C., 43 Am. Dec. 507, note 519, where other Mississippi cases on this subject are referred to.

Missouri.—The copy and probate of the foreign will duly authenticated may be proved in the same way that wills executed in Missouri are proved, and will then have the same effect. But in order to pass real estate, the will must have been executed according to the Missouri law. A will of personalty may be executed according to the law of Missouri, or according to the law of the testator's domicile: 1 R. S. Mo., c. 71, secs. 3992–3994 (1879).

Nebraska. See under Kansas, *supra*.

Nevada.—The copy and probate of a foreign will are admitted on hearing with notice in this state, and when admitted, the will has the same effect as a will originally admitted to probate in Nevada, provided it was executed in conformity with the Nevada law: 1 Nev. Comp. L., secs. 506–510.

New Hampshire.—In this state a duly authenticated copy of a foreign will and probate may be admitted to probate by the decree of the probate court, after hearing upon such notice as the judge shall order, and “such decree shall have the same effect as if such will were executed out of the state, with the formalities now required by the laws of this state:” N. H. Gen. L., c. 194, sec. 13.

New Jersey.—The New Jersey act of 1882, c. 89, p. 112, authorizes the surrogate to record a duly authenticated copy of a foreign will duly authenticated, and provides that it shall have the same effect as if such will had been admitted to probate in New Jersey.

New York.—In this state the surrogate is authorized to admit to record a duly authenticated copy of a foreign will, and the probate thereof, and such record is made presumptive evidence of the will and of the execution thereof, in any action or special proceeding relating to real property: N. Y. C. P., sec. 2703. “The legal effect of the statute . . . is to make an exemplified copy of a will made in another state or territory of the United States, and the proofs thereof when recorded equivalent to proof of the will in this state:” Gilbert, J., delivering the opinion of the court in *Bromley v. Miller*, 2 Thomp. & C. 576.

North Carolina.—A foreign will, an authenticated copy of which has been admitted to probate in this state, must, in order to pass real estate, have been executed with the formalities necessary for that purpose in North Carolina: Battle's Rev., c. 119, sec. 21. See under Georgia, *supra*.

Ohio.—In Ohio a duly authenticated copy of a foreign will and the probate thereof is admitted to probate upon notice, and then has the same effect as if the will had been originally proved and allowed in the same court in the usual manner: 2 Ohio R. S., secs. 5938–5941 (1880). A will duly executed and proved in a sister state, when an exemplified copy is recorded in a court in Ohio, is as valid to vest title in the devisee as a domestic will duly probated: *Carpenter v. Denoon*, 29 Ohio St. 379.

Pennsylvania.—The foreign will, when a copy thereof duly authenticated is proved in this state, has the same effect as if it had been originally proved in Pennsylvania.

Rhode Island.—In this state application must be made to the court to permit the authenticated copy and probate to be filed and recorded. Notice must be given as in the case of an original application for probate. If no objection is made, or none in the judgment of the court sufficient to prevent it, the court shall cause the copy to be filed, and direct it to be recorded, when “the filing and recording thereof shall be of the same force and effect as the filing and recording of an original will, proved and allowed in the said

court of probate:" R. L. Pub. Stata. 1882, p. 474. But no such will is valid unless "executed, subscribed, and attested according to the law of this state:" Id.

South Carolina.—Where the will has been proved in solemn form in the foreign court, the exemplified copy thereof and of the probate may be admitted to probate in this state, when it shall have the same force and effect as a domestic will duly admitted to probate. But if the will was not proved in the solemn form, witnesses may be examined, on the application to have probate in this state, in reference to the testator's capacity, etc.: Gen. Stata. S. C., sec. 1875 (1880).

Tennessee.—An authenticated copy of the will and probate has, when admitted to probate in this state, the same effect as if made in Tennessee. But such will must be made according to the laws of Tennessee, and its admission to probate may be contested on the same grounds on which a Tennessee will may be contested: Tenn. Code, secs. 3022-3030 (1884).

Texas.—In this state the proceedings of probate courts of other states are treated as judicial proceedings which may be authenticated under the act of congress, and when so authenticated, to have the same force in Texas as judgments of courts of sister states: *House v. House*, 16 Tex. 598.

Vermont.—The Vermont statute provides that the duly authenticated copy of a foreign will and probate may be admitted to probate in that state, after notice, if the court is satisfied that it ought to be admitted, and it then has the same effect as if originally proved and allowed in Vermont: Vt. Rev. L., secs. 2858-2861 (1880). The foreign will cannot be read in evidence in Vermont unless a copy has been filed and recorded in the proper court in Vermont: *Ives v. Allyn*, 12 Vt. 589. After the copy of the will has been allowed to be filed and recorded in Vermont, it will be presumed that the probate court that proved it had jurisdiction until the contrary appears; and all objections to the authentication must be taken in the probate court, or they are waived: *Townsend v. Estate of Downer*, 32 Id. 183.

Virginia.—The law of Virginia on the subject under consideration is as follows: "Where a will relative to estate within this state has been proved without the same, an authenticated copy thereof, and the certificate of probate thereof, may be offered for probate in this state. When such copy is so offered, the court to which it is offered shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the state or country of the testator's domicile, and shall admit such copy to probate as a will of personalty in this state. And if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this state by the law thereof, such copy may be admitted to probate as a will of real estate:" Va. Code, p. 914 (1873). It seems that if the authenticated record does not affirmatively show that the foreign will was proved to have been executed so as to pass realty in Virginia, it can only be proved as a will of personalty in Virginia: *Ex parte Todd*, 3 Leigh, 819.

West Virginia.—The law of this state, in reference to this subject, is substantially the same as that of Virginia.

Wisconsin.—If the court in this state finds that the order or decree of the foreign court admitting the will to probate was made by a court of competent jurisdiction, and is still in force, it admits the will to probate in Wisconsin, where it then has the same effect as if originally proved and allowed there: Wis. R. S., secs. 3789-3791 (1878). After a copy of the foreign will and probate is admitted in this state, it operates on real as well as personal estate:

Markwell v. Thorne, 28 Wis. 548; *Hayes v. Lienlokken*, 48 Id. 509. In the latter case it was held that where the mortgagee of land in Wisconsin is a resident of another state, the record in the county where the land is situated, of an instrument purporting to be his last will and testament, and of the probate thereof in such other state, is no proof either that the mortgagee is dead, or that the person named in such instrument as his executor had authority to act as such in foreclosing the mortgage.

POWER OF PROBATE COURT TO REVOKE PROBATE OF WILL: See *Wall v. Wall*, 64 Am. Dec. 147, note 154. The principal case is cited in *Waters v. Stickney*, 12 Allen, 14, to the point that the power to revoke a probate is a just and necessary power to be implied from a statute conferring general authority upon probate courts "to take the probate of wills and grant administration on the estates of deceased persons."

POWER OF PROBATE COURT TO ADMIT SECOND WILL TO PROBATE: See *Schultz v. Schultz*, 60 Am. Dec. 335.

OLNEY v. ANGELL.

[5 RHODE ISLAND, 198.]

LEGATEES UNDER WILL MADE IN ANOTHER STATE BY RESIDENT THEREOF MAY SUE IN EQUITY ADMINISTRATOR of estate of their testatrix, in Rhode Island, for an account of assets and the payment of their legacies, notwithstanding such will has not been proved or filed and recorded in Rhode Island, since they sue in their own right, and not in the right of their testatrix, or as her representatives.

PROBATE COURTS OF RHODE ISLAND HAVE EXCLUSIVE JURISDICTION over the probate of wills, and the supreme court has no original jurisdiction to hear proof of a will or to allow it.

EFFECT OF DECREE PROVING WILL IS CONFINED TO TERRITORY, and things within the territory of the state, establishing the court by which such decree is rendered. And article 4, section 1, of the constitution of the United States, does not extend the operation of the probate of a will, as a judicial act of a state, beyond its own territory. "Full faith and credit" is given to such a decree when it is left where it is found, local in its nature and operation.

WILL MADE IN ANOTHER STATE BY ONE DOMICILED THERE MUST BE FILED AND RECORDED IN PROPER PROBATE COURT IN RHODE ISLAND before it can be allowed to operate upon property in the latter state.

BILL in equity. The opinion states the case.

Lapham, for the complainants.

R. W. Greene, for the respondents.

By Court, AMES, C. J. This bill is brought by two of the legatees under the will of the late Susan Olney, which has been admitted to probate in Wisconsin, where she died, but has never been proved or filed and ordered to be recorded here, against the administrator appointed upon the estate of said

Susan in Rhode Island, for an account and administration of her estate here in accordance with her will, or for a decree that the same may be paid and delivered over to the husband of one of the plaintiffs, who is also administrator of the said Susan in Wisconsin, with the will annexed, for the due administration of this her estate there, in accordance with her said will. The plaintiffs do not, therefore, sue in any representative, but in their personal character, as special and residuary legatees, entitled to the property in the hands of the defendant, the Rhode Island administrator of their testator, by virtue of her will; and although one of them is stated in the bill to be the administrator with the will annexed of the said Susan in Wisconsin, he is also the husband of one of the said legatees, and is joined with her, and entitled to be joined with her, personally in this suit, as her husband. The objection that this is a suit by a foreign administrator therefore fails, according to the distinction taken by Mr. Justice Story in *Trecothick v. Austin*, 4 Mason, 16; and in *Harvey v. Richards*, 1 Id. 381; the plaintiffs suing here in their own right, and not in the right of the decedent, Susan Olney.

Their title to the relief which they ask is, however, founded solely upon the will of Susan Olney; neither the execution nor validity, nor the validity of the probate of which, is admitted in the answer. Without going into these questions of execution and validity, which may more properly be brought before us in another proceeding, it is sufficient now to say that this will has never been proved before or ordered to be filed and recorded under the statute by any probate court in Rhode Island; and that, unless the probate in Wisconsin is to have effect upon the estate of the testatrix in Rhode Island, we have and can receive, sitting in chancery, no proof whatsoever that this is the will of Susan Olney. The exclusive jurisdiction over the probate of wills, as to both real and personal estate, is vested by our statutes in the appropriate probate courts of the several towns, with an appeal from each to this court, as the supreme court of probate; and if this will has not already been proved in such mode as to be operative upon things in Rhode Island, we have no original jurisdiction whatsoever to hear proof concerning and to allow it: *Tompkins v. Tompkins*, 1 Story, 547, 554-559; *Langdon v. Goddard*, 2 Id. 267, 276; *Mathewson v. Sprague*, 1 Curt. 457, 463; *Moore v. Greene*, 2 Id. 202, 203; *Gaines v. Chew*, 2 How. 646.

Is, then, the will of Susan Olney, for the purpose of the relief here sought, entitled to be considered as proved, by virtue of

the probate in Wisconsin? It is true that in England the probate of a will has always been considered as a judicial act: *Lee v. Moore*, Palm. 163; yet, at the same time, as limited in its effect to things locally within the jurisdiction of the court granting it. Thus, a Scotch probate is not recognized by an English court of chancery: *McDonald v. Bryce*, 17 Eng. L. & Eq. 305, 308; but if the testator be domiciled in Scotland and leave effects there and in England, the will is proved in the first instance in the court of great sessions in Scotland, and a copy duly authenticated being transmitted to England, it is proved in the ecclesiastical court, and deposited there as if it were an original will: 1 Williams on Executors, 205; Toller, 70. On the other hand, it is settled that an English probate does not operate upon the effects of the testator abroad, though he be domiciled in England and the will disposes of the foreign effects; and hence the probate duty given by 53 Geo. III., c. 184, "in proportion to the value of the estate and effects for and in respect of which such probate shall be granted," is not payable in respect of the personal property of such testator situated in a foreign country at the time of his death, though it be afterwards brought to England and there administered: *In re Ewin*, 1 Crompt. & J. 157, per Bayley, B.; *Attorney-General v. Dimond*, Id. 356; *Attorney-General v. Hope*, 1 Crompt. M. & R. 530; *Attorney-General v. Bouwens*, 4 Mee. & W. 171, 190.

It is old law that a will made in a foreign country and proved there must also be proved in England in order to dispose of personal property in England: *Lee v. Moore*, Palm. 163; *Tourton v. Flower*, 3 P. Wms. 369; *Vanthienen v. Vanthienen*, Fitzg. 204.

Following this rule so early established and so fully carried out in the mother country, we apprehend it to be equally well settled by the decisions and legislation of this country that the effect of a decree proving a will, like that of a decree granting administration, is confined *de jure* to the territory, and things within the territory, of the state setting up the court. In their nature, such decrees are decrees *in rem*, passed by courts deriving all their authority from the state which institutes them, and necessarily, in great part upon constructive notice only to those interested in the decrees; and it is difficult to see how a wider operation could be allowed to them, consistently with a just attention to the rights and claims, to the property of the decedent, of citizens of other states in which the property was at the time of his death. Whatever other operation is allowed to them is a mere matter of comity.

which every state is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its citizens: *Boston v. Boylston*, 2 Mass. 384, 391; *Goodwin v. Jones*, 3 Id. 514, 520 [3 Am. Dec. 173], Parsons, C. J.; *Pond v. Makepeace*, 2 Met. 114; *Doolittle v. Lewis*, 7 Johns. Ch. 45, 47 [11 Am. Dec. 889]; *Strong v. Perkins*, 3 N. H. 517; *Kittredge v. Folsom*, 8 Id. 111; *Ives v. Allyn*, 12 Vt. 589; *Woodruff v. Taylor*, 20 Id. 65, 73; *Budd v. Brooke*, 3 Gill, 198 [43 Am. Dec. 321]; *Ward v. Hearne*, Busb. L. 184; S. C., 3 Jones L. 326; *Wilson v. Tappan*, 6 Ohio, 172; *Bailey v. Bailey*, 8 Id. 239; 1 Marsh. 803; *Sneed v. Ewing*, 5 J. J. Marsh. 465 [22 Am. Dec. 41]; *Darby v. Mayer*, 10 Wheat. 465, 469; *Armstrong v. Lear*, 12 Id. 169, 175, 176; *Vaughn v. Northup*, 15 Pet. 5; *Stacy v. Thrasher*, 6 How. 59-61; *McLean v. Meek*, 18 Id. 16; Story's Conf. L. 425, note, and secs. 512-514 a, and p. 431, note; 1 Williams on Executors, 204, note 1.

The legislation, we believe, of nearly all the states, and certainly of our own, proceeds upon the supposition that such is the limited operation of a probate of a will had in a foreign country or in another state; and provides some mode, in general analogous to that pursued in England with regard to a will which has received a Scotch probate, by which conclusive operation may be given to such a will within the state, full notice being given to all persons interested in order that they may appear and contest the validity of the same: R. S. R. I., c. 155, secs. 5-10; *Dublin v. Chadbourn*, 16 Mass. 433; *Laughton v. Atkins*, 1 Pick. 535; *Trecothick v. Austin*, 4 Mason, 34; 1 Williams on Executors, 205, note 1; Story's Conf. L., sec. 513, and note 1, and cases cited.

We do not apprehend that article 4, section 1, of the constitution of the United States, extends to the operation of the probate of a will, as a judicial act of a state, beyond its own territory. "Full faith and credit" is given to such a decree when it is left where it is found, local in its nature and operation.

Our conclusion is, that we cannot give effect to the Wisconsin probate of the will of Susan Olney, as evidence of its validity, in order to allow her will to operate upon property in Rhode Island; and that before her will can afford a proper foundation to the plaintiffs for the relief which they seek, it must be filed and recorded in the proper probate court here, in pursuance of chapter 155, sections 5-10, of the revised statutes. We have purposely avoided the consideration of the question turning

upon the construction of that chapter, and suggested by the respondent, in reference to foreign wills when executed with the formalities required by the law of the place of the testator's domicile, though not with those required by our own, as well as of other questions touching the validity of this will, as a will operative upon the personal property of the testatrix here at the time of her death. These questions will more properly come before us, if at all, upon appeal from the decree of the court of probate, in which a copy of this will shall be filed for allowance and record.

This bill must be dismissed; but in the view which we now take of the substantial merits of the claim of the plaintiffs, and the position of the defendant as a trustee, we think it must be without costs.

POWER OF PROBATE COURT TO REVOKE WILL: See *Schultz v. Schultz*, 60 Am. Dec. 335; *Wall v. Wall*, 64 Id. 147.

EFFECT OF WILL ADMITTED TO PROBATE IN ANOTHER STATE: See *Bowen v. Johnson*, *ante*, p. 49, and note.

SIMMONS v. BROWN AND WIFE.

[5 RHODE ISLAND, 299.]

PLAINTIFF, TO PROVE HIS DAMAGES, MAY GIVE EVIDENCE OF PROFITS WHICH HE MIGHT HAVE MADE upon goods that he could have manufactured, and which he was prevented from manufacturing by the act of the defendant, in raising a dam below plaintiff's mill on the same stream, by reason of which erection the water was made to flow back and impede the operation of such mill.

EVIDENCE OF LOSS OF PROFITS IS USUALLY ADMITTED wherever such loss is the natural and necessary result of the act charged.

HUSBAND AND WIFE MAY BE CHARGED JOINTLY IN ALL ACTIONS FOR TORT in which two or more persons may be jointly guilty.

ACTION on the case. There was a verdict for the plaintiff, and the defendants moved for a new trial. The other facts are stated in the opinion.

Payne and R. W. Greene, for the motion.

T. A. Jenckes, contra.

By Court, BRAYTON, J. The first ground for a new trial assigned by the defendants is, that the court admitted evidence to show the profits which the plaintiff might have made upon the goods, which, but for the injuries complained of, he might

have manufactured, and which he was prevented from manufacturing by such injuries.

The action was brought to recover damages caused by the raising by the defendants of their dam below the plaintiff's mill, causing the water to flow upon the plaintiff's wheel, and impeding the operation of his mill; and the plaintiff claims damages for the loss of profits in the business which he carried on there, of manufacturing cotton goods. The plaintiff's mill was fitted to occupy all the water-power which belonged to the plaintiff with sufficient machinery for that purpose. By a bill in equity, filed by the plaintiff against the defendants, alleging this nuisance, the right of the defendants to maintain this dam had been in controversy, and by a decree of the court the dam was reduced to its present height, and this action was brought to recover the damages accrued to the plaintiff before the reduction of the dam, and after the raising of it. In assessing the plaintiff's damages on the trial of the action, the plaintiff was allowed to offer evidence to show the additional quantity of goods which the mill was capable of making, and probably would have made, had the wheel been unobstructed by the dam, the value of those goods when made, the cost of making, and the prices which such goods brought in the market during the time, thus showing the general profit of the business which the plaintiff carried on.

The defendants objected to the admission of this evidence, on the ground that the plaintiff was not entitled to recover the profits of the business which he might have done with this additional water-power, used by the defendants, but was entitled only to a reasonable and fair rent for the use of it by the defendants. The objection was overruled; and the question is whether this evidence was properly admissible.

The plaintiff is to be made good for all the damages which he has suffered from the injurious act of the defendants; and, by the general rule in actions of trespass, for all the damages which result directly and necessarily from the proximate and natural consequences of the act complained of, as distinguished from remote, uncertain, or contingent results: 2 Greenl. Ev. 256, 261. For this reason, evidence as to profits, as a general rule, is rejected; because, generally, they are uncertain and contingent, depending upon other circumstances than the injurious act of the defendants, and not the natural result of it. Nevertheless, the general rule is subject to many exceptions; and it will be seen from the cases upon this subject that wherever the

loss of profits is the natural and necessary result of the act charged—such as the party probably would have made, not what by chance he might have made, but what any prudent man must naturally have made—evidence has been, if not always, most usually admitted as to them.

In actions for breaches of contract, the profits resulting to the plaintiff from the contract which he has entered into, and which must naturally come to him if it be performed, are allowed him as the measure of his damages, if it be broken by the defendants, and he is thereby deprived of them. In *Masterton v. Mayor of Brooklyn*, 7 Hill, 61 [42 Am. Dec. 38], which was on a contract to furnish marble for the city hall of that city, it was held that the plaintiff was entitled to recover what he would probably have made if the contract had been performed, viz., the difference between the cost to him of delivering the marble and the price which, by the contract, he was to receive. In this case, Nelson, C. J., says: "When the books speak of profits as too remote and uncertain to be taken into the account in estimating the damages, they have reference, usually, to dependent and collateral engagements entered into in faith of, and in expectation of, the execution of the principal contract; but profits which are the direct fruit of the contract broken stand upon a different footing. They are part of the contract itself." In *Philadelphia etc. R. R. Co. v. Howard*, 13 How. 307, there was a similar contract. It was to furnish certain building materials for the road. Upon the breach of this contract it was held, that in estimating the damages, the difference between the contract price and the cost price to the plaintiff was the measure of damages; and the court say that "the profits were the inducement to the contract, the consideration for which the plaintiff contracted on his part, and which are lost by the breach of it by the defendant, and must be made good. The profits in this case are not only admissible in evidence, but are the measure of damages."

In *McNeill v. Reid*, 9 Bing. 68, the contract was that if the plaintiff would not accept the place of master of a ship in the East India service, for a voyage to India, the defendants would admit him as a partner in a firm, to the extent of one fourth of the profits. It was held that the plaintiff was entitled to recover the value of such a voyage to him—what he would reasonably and probably have realized from it had he proceeded upon the voyage; and evidence was offered as to the usual amount realized from such voyages; and the jury

assessed the damages at five hundred pounds. The court refused to disturb the verdict. This amount was not allowed however, as the measure of damages, but, as Bosanquet, J., said, "as an ingredient for estimating the value set upon the contract by the parties." In *Waters v. Towers*, 20 Eng. L. & Eq. 410, the action was for breach of contract for the non-delivery of certain machinery within a reasonable time; and special damages were laid that the plaintiffs had been prevented from completing their contract with a third person, whereby they had lost the profits which they would have made had they completed it. Evidence as to this last contract was admitted, and of the advantage to the plaintiff from its performance. It was held that the evidence as to the profits was properly admitted, and that the jury might assess damages to the amount of them, though they were not bound to do so; and the court said, if reasonable evidence is given that the amount of profits would have been made if the defendant had performed his contract, the damages may be assessed accordingly; and this though the second contract was one which could not have been enforced against the plaintiff, on the ground of the statute of frauds.

These cases are all for breaches of contract. In the first two the profits were not only allowed to be given in evidence, but are made the measure of damages. In the last, though the evidence of was held to be properly admitted as the basis for estimating the damages, the profits were not held to be the measure of damages; and it was left to the jury, with this basis, to estimate them. There is nothing in the term "profits" that excludes their being given in evidence more than any other item of damages; but proof of them is made to depend, like all other proof in relation to damages, upon the fact that the loss of them is the natural and direct result of the injury, and not a remote consequence; and the language of the court in the last case is significant: "That if reasonable proof be given that the plaintiff would have made the profits—that is, that those profits were the direct result of the performance by the defendant, and the loss the result of the breach—it was sufficient to warrant a recovery of them."

There are other cases, not upon contracts, where profits are allowed to be given in evidence. *Tarleton v. McGauley*, Peake N. P. 270, was an action on the case for firing upon negroes on the coast of Africa, near the trading post of the plaintiff, by which the negroes were deterred from trading with him, and there was a consequent loss by the plaintiff of the trade with

them. The plaintiff was allowed to recover. Whatever was lost to the plaintiff must have been profits; for upon this only depended the value of the trade which he had lost. The value of that trade to him was allowed to be put in evidence. It must have been admitted on the ground that the loss of profit and of the trade was the direct and natural result of the unlawful act of the defendant. In *Ingram v. Lawson*, 6 Bing. 212, the action was for libel in publishing that the plaintiff's vessel, then fitted and ready for sea for freight, was unseaworthy, and had been sold to Jews to take out convicts. The plaintiff was allowed to prove the average profits of such a voyage as was broken up; and upon a motion for a new trial, the court said that the evidence was not admitted as the measure of damages, but only that the jury might see the nature of the business and the general profits. Coltman, J., said: "The jury must have some mode of estimating the damages, and they could not be in a condition to do so unless they knew something of the plaintiff's business and the general return of his voyages." *White v. Moseley*, 8 Pick. 356, was an action of trespass for destroying part of plaintiff's mill-dam, and thereby interrupting the use of the plaintiff's mill, whereby he lost the profit of the same. Damages were allowed in this case for diminution of the profits; and the court say: "The interruption of the use of the mill and diminution of the profit were alleged and proved; and we think this was right. The plaintiff is entitled to recover for all damages."

In *Williams v. Barton*, 13 La. 404, the court use this language in relation to contract: "The damages for breach of contract are those which are incidental, and caused by the breach, and may reasonably be supposed to enter into the contemplation of the parties at the time of the contract." There does not seem to be any solid ground for departing from the principle which governs breaches of contract in this respect, or suits for damages occasioned by torts. If the damages be such as the party committing might reasonably conclude would result from the act, since every man is presumed to intend the natural and probable result of the act which he designedly commits, there seems no reason to exclude them. There is therefore no ground for excluding profits simply because they are profits; but the loss of them must be governed by the same rule as other damages. If the loss of them be the direct and necessary result of the defendant's acts, whether by breach of contract or tortious act, it can make no difference, the dam-

ages are equally proximate and certain, and are no more contingent in the one case than in the other; neither more nor less remote.

The evidence objected to, we think, was properly admissible to be weighed by the jury in estimating the plaintiff's damages in this case; and to determine what the plaintiff would have made had he not been prevented by the act of the defendants. No objection is here made to any instruction given to the jury in reference to their consideration of the evidence submitted.

It is claimed by the defendants that the mode of estimating the damages, and the only legal mode, is to ascertain the amount of the water-power which is obstructed, and of which the plaintiff is deprived, and to ascertain the fair, reasonable rent for so much power, and to make this amount of rent the measure of damages. If this were matter of contract, and the plaintiff were suing for the use, this might be the proper rule. But it is not the purpose of this suit, and cannot be till the plaintiff chooses to treat the defendant as the rightful occupier of his fall. The plaintiff is the owner of the whole fall and of the mill, which he himself is operating for profit. He does not wish, and would not consent, to lease any part of it. It would be an injury to his business to do so. To receive merely a fair rent for the power of which he is wrongfully deprived would not make his business equal to what it would be to have the power entire; his business being adapted to the use of the whole, mere rent would not make him whole. He cannot be made good without treating him, not merely as landlord, but as tenant. As landlord, he is entitled to a fair and reasonable rent. But suppose he were a tenant paying that reasonable rent, is it sufficient to say that his rent, as to so much of the power as he cannot use, and for which he is nevertheless bound to pay, shall be paid for him? If this were the rule, we might expect to find much of this compulsory kind of underletting—hiring water-power against the occupant's will. It is no sufficient answer to say that further damages are not proximate, or that they are not the natural, probable, direct result of the act.

The defendants' counsel requested the court to charge the jury that Abby Brown, being a married woman, and the wife of the other defendant charged, and being owner of the fee of the land upon which the dam was built, and the premises being in the possession of the husband, no action could be maintained against her, and no verdict could be rendered

against her. This instruction the court declined to give; and the defendants now move for a new trial for this as error.

It cannot be material to this point that the wrongful act was committed on land owned by the defendant Abby Brown. There is no principle suggested, and certainly none can be found, that should thus change the character of the acts of the defendants. The locality of the act is not that which can impress upon it a wrongful character. It is equally injurious to the plaintiff whether it be done on the defendants' land, or done upon the plaintiff's. Equally immaterial is it that the act was done upon land in the possession of the husband; and for the same reason. The locality of the act in these particulars can have no other effect, at most, than as matter of evidence of the extent to which the wife participated in the acts of the husband. The question, therefore, which is here made is, whether a married woman can be jointly guilty with her husband of a wrong of this kind; in effect, whether she can be guilty with him of any trespass; for whether the injury arising from it be direct or consequential cannot be material.

In *Marshe's Case*, 1 Leon. 312, it was held that where goods came to the wife alone, and both husband and wife were charged with converting them, the action might be maintained. *Baldwin v. Mortin*, Owen, 48, was also an action of trover against husband and wife, alleging a conversion by both, to her use, and was held good. In *Berry v. Nevys*, Cro. Jac. 661, it was held that though the joint conversion was well, yet that the conversion must be alleged to be to the use of the husband; since it could not inure to the use of the wife. It was conceded that the action was open to this objection only. In *Draper v. Fulkes*, Yelv. 165, 166, which was trover against husband and wife, the allegation was, that the goods came to both, and that they converted them. The objection to a recovery in this case was, that it charged a conversion on both, and that a *feme covert* could not convert; and Yelverton answered, and the court allowed, that "the action is grounded, not upon property, but possession only; and the point is the conversion, and she may as well be charged as in trespass or disseisin." *Morfoot v. Chivers*, 2 Ld. Raym. 1395, was *scire facias* against the defendants as administrators, and alleged the wasting of the goods of the intestate by both; and this point was made, that the wife could not be guilty. It was nevertheless held good; for that the wasting of the estate was a tort; and though a *feme covert* might not convert, yet she

might waste, which was a tort; and this decision was affirmed by the house of lords.

In *Smalley v. Kerfoot*, Andrews, 243, the case was trespass for entering the plaintiff's house and taking his goods and converting them to their proper use. In this case it was conceded that the action would well lie against both husband and wife for the trespass. There was a judgment by default, and an assessment of damages. The point made was upon a motion in arrest of judgment, for that the declaration alleged a conversion to the use of the wife. This case was argued a second time, at the request of the judges; and upon this argument it was conceded that for a battery or other personal wrong committed by *baron and feme*, the wife is liable to an action as well as the husband; but as to the conversion, it could not be to her use. The point made was overruled, because the conversion was not the gist of the action, but matter of aggravation merely. In *Anonymous*, 1 Vent. 93, the declaration alleged an assault and battery by both husband and wife, and the husband was found not guilty. There was a motion in arrest of judgment, for that, it being a battery by the wife alone, he should be joined for conformity only; but the motion was overruled. But the general doctrine, as well settled, is stated in Ch. Pl. 83, that husband and wife may be joined in all actions in which two or more persons may be jointly guilty, and may be charged jointly. This ground for new trial must be also overruled, and there must be judgment upon the verdict.

AMES, C. J., having been of counsel, did not sit in this case.

LOSS OF PROFITS AS DAMAGES: See *Griffin v. Colver*, 69 Am. Dec. 718, note 725, where this subject is discussed, and other cases in this series are collected. Evidence of loss of profits may be admitted, not as a basis of damages, but as a guide to the jury to aid them in the exercise of their discretion in assessing damages: *City of Logansport v. Justice*, 74 Ind. 386, citing the principal case.

LIABILITY OF HUSBAND FOR WIFE'S TORTS: See *Hubble v. Fogarty*, 45 Am. Dec. 775, note 778.

GILL v. READ.

[5 RHODE ISLAND, 343.]

WHERE PLAINTIFF SEEKS TO RECOVER ON DOUBLE GROUND, and it is not known upon which ground a verdict was found for him, the appellate court will grant the defendant a new trial for misdirection in matter of law touching either ground of liability.

IMPLIED AUTHORITY OF WIFE KNOWN TO LIVE SEPARATE FROM HER HUSBAND, to bind him for necessities supplied to her, depends wholly upon

his legal obligation to provide for her, and is unaffected by the ignorance or knowledge of the creditor as to the facts upon which such liability depends.

ADULTERY OF WIFE RELIEVES HUSBAND FROM OBLIGATION TO PROVIDE HER WITH NECESSARIES, whether such adultery is committed before or after her separation from her husband, and whether the person supplying her with necessities knew of the adultery or not.

DECREE DISMISSING HUSBAND'S PETITION FOR DIVORCE FOR CAUSE OF ADULTERY is not evidence, in an action against him for necessities furnished to his wife during their separation, to prove that she did not commit adultery prior to the petition for divorce or during its pendency. And he is not estopped by such decree from offering in defense in such action proof of the adultery of his wife prior to the accruing of the plaintiff's account.

WIFE LIVING SEPARATE FROM HUSBAND HAS NO AUTHORITY TO BORROW MONEY at his charge; but if the lender lays out the money, or sees it laid out, for necessities, he may charge them as provided by himself.

FATHER'S OBLIGATION TO PROVIDE FOR HIS CHILD IS NOT AFFECTED BY HIS WIFE'S MISCONDUCT, and if he suffers the child to live with her separate from him, he thereby constitutes her his agent to contract for the child's necessities, and will be liable to those who furnish them upon his credit.

ASSUMPSIT to recover for the rent of a house, board, clothes, and money furnished by the plaintiff to the wife of the defendant for herself and child while living separate from her husband. On the trial, the defendant offered to prove that, prior to the furnishing by the plaintiff of any of the articles mentioned in the plaintiff's bill of particulars to the defendant's wife, she had committed the crime of adultery, or facts from which the commission of adultery might be inferred. The court rejected this evidence on the ground stated in the opinion. The court also ruled that it was only competent for the defendant to offer evidence of the adultery of his wife during the period which elapsed after the entering up of the decree referred to in the opinion, and before the furnishing of the articles sued for, when accompanied with proof that the plaintiff when he furnished the defendant's wife knew of her adultery, or with proof that her adultery was so notorious that the jury must infer that the plaintiff then had knowledge of it. The defendant also objected to the money charges, but the court overruled the objection. The jury found a verdict for the plaintiff, and the defendant brought his exceptions to this court. Other facts are stated in the opinion.

Van Zandt, for the plaintiff.

Sheffield, for the defendant.

By Court, AMES, C. J. It is evident from the bill of exceptions that the plaintiff sought in this action to bind the husband for necessities furnished to his wife, upon the double ground of authority in law and of authority in fact, growing out of a previous dealing in the same matter; but as we cannot know upon which ground the jury proceeded in their verdict, the defendant will be entitled to a new trial for misdirection in matter of law touching either ground of liability.

The implied authority of a wife, known to live separate from her husband, to bind him for necessities—growing, as it does, out of his legal obligation to provide them for her—is wholly dependent upon the existence, under the circumstances of each case, of that obligation; and is unaffected, since he is bound to inquire and inform himself of them, by the actual ignorance or knowledge of the creditor, of those circumstances. So far as this source of authority is concerned, the tradesman who trusts a wife living separate from her husband trusts her upon the husband's credit, as the common expression is, at his own peril; the husband being liable if in fact he was bound to provide for her, and not liable if not, under the circumstances, so bound: Chit. Con. 164, and cases cited; Bell on Husband and Wife, 27. It is also well settled, that not only is such authority revoked by the adultery of the wife, but that even if she has left the husband's house under circumstances which would justify her in so doing, or has, without cause, been turned out of doors by the husband, and afterwards commits an act of adultery, this will relieve the husband from the obligation to provide her with necessities, and hence from all liability for them upon the mere ground of her implied authority as a wife to charge him with them: *Govier v. Hancock*, 6 T. R. 603, 604.

So far, then, as the plaintiff's claim proceeded merely upon the implied authority of the defendant's wife to bind him for necessities furnished to her, the husband's defense, that he had turned her away because she had committed adultery, or that whilst living separate from him she had committed adultery, was good in law; and to avail him did not depend, as was supposed by the court below, upon a knowledge of the fact of adultery by the plaintiff, whether to be brought directly home to him by proof, or to be inferred from general notoriety.

The main question, however, raised by the bill of exceptions is, whether the defendant was estopped from offering in defense proof of the adultery of his wife prior to the accruing of plaintiff's account, by the decree of this court refusing him a divorce

causa adulterii. We know not upon what ground the court below founded its notion of such an estoppel. If this court had granted the divorce for cause of adultery, it clearly would not have estopped the plaintiff from contesting in this action the fact of adultery; since, as he was no party, nor the privy of any party, to the proceeding, he could not be bound or in the least affected by the decree: *Robins v. Crutchley*, 2 Wils. 124. As he could not be prejudiced by a decree in a proceeding to which he was not a party, so neither now can he avail himself of it against the defendant as evidence, and especially as conclusive evidence, that the wife of the defendant did not commit adultery prior to the petition for divorce, or at any time between the petition and decree. As between the plaintiff and defendant, the fact of the adultery is *res nova*—never before litigated or decided; and the exclusion of the testimony offered by the defendant is warranted by no such policy—*ut sit finis litium*—as lies at the bottom of the rule which makes judgments conclusive between parties and privies: 1 Stark. Ev., pt. 2, sec. 62, and cases cited.

For these reasons, pertaining, it will be noticed, solely to the ground of implied authority in the wife to bind her husband, and not at all touching the other ground upon which the plaintiff claims to have been entitled to credit her, there must be a new trial of this cause.

For the purposes of the new trial, we take notice of two classes of items in the bill of particulars of the plaintiff, one of which has and the other of which has not, so far as the bill of exception shows, been the subject of a ruling by the court. The first of these consists of the three items for money loaned to the wife. It is old law that neither a wife nor an infant has credit to borrow money; the credit being for necessities, and not for money to buy them with, which may be misapplied: *Earle v. Peale*, 1 Salk. 386. If, indeed, the lender lays out the money, or sees it laid out, for necessities, he may charge them as provided by himself; and thus the application of the loan is left, as it should be, at his peril: *Id.*; and see *Stone v. McNair*, 4 Price, 48, 49. If, as we understand the bill of exceptions, the money was furnished by the plaintiff directly to the wife, and there was no evidence that the same was applied by her to the purchase of necessities, which the plaintiff charged, as he might, as furnished by himself, the ruling as to these items was erroneous.

The other items of claim in the account of the plaintiff to

which we refer are those for the board and clothing of the defendant's infant child. These stand upon a different footing from necessities furnished to the wife; since the father's obligation to provide for his child is not affected by her misconduct. If, notwithstanding such misconduct, he suffer his child to live separate from him, with her, he thereby constitutes her his agent to contract for the child's necessities, and is liable to those who furnish them upon his credit: *Rumney v. Keyes*, 7 N. H. 571.

Verdict set aside and a new trial granted, to be had at next term of the court of common pleas for the county of Newport.

DUTY OF FATHER TO MAINTAIN HIS MINOR CHILDREN: See *Presley v. Davis*, 62 Am. Dec. 396; *Gaston v. Gaston*, 57 Id. 223, note 226; *Myers v. Myers*, 16 Id. 648, note 661.

HUSBAND'S LIABILITY FOR NECESSARIES SUPPLIED TO HIS WIFE: See *Mitchell v. Treanor*, 56 Am. Dec. 421, note 423, where other cases are collected.

HUSBAND IS NOT LIABLE FOR MONEY LENT TO HIS WIFE, although she may have used it to procure necessities: See *Walker v. Simpson*, 42 Am. Dec. 216, note 219.

KNOWLES v. HARRIS.

[5 RHODE ISLAND, 402.]

REMEDY BY ACTION OF ACCOUNT BETWEEN CO-TENANTS, GIVEN BY RHODE ISLAND STATUTE, R. S., c. 209, sec. 1, is not confined to the rents and profits of the joint estate actually received by one co-tenant in a greater share or proportion than by the other. And where one of the co-owners of a joint estate consisting of a manufacturing establishment has had the exclusive use thereof, the rentable value of the excluded co-owner's share of the estate is the fair test of the value of the use of his interest, irrespective of the profits made or the losses suffered by the occupying co-tenant during his exclusive occupancy.

ACTION of account against the defendants, as co-owners with the plaintiff's intestate of a manufacturing establishment, alleged to have been exclusively used by the defendants from the twenty-seventh of September, 1856, to the eleventh of June, 1857, brought to recover the proportionate share of the income, profits, and use thereof due to the plaintiff's intestate. The case was referred to the auditor, who reported, upon the basis referred to in the opinion, that the plaintiff was entitled to the sum of three hundred and ninety-seven dollars and twenty cents. The defendants objected to the payment of that sum, on the ground that they had made no profits, but, on the other

hand, had suffered losses during the term. Other facts appear from the opinion.

J. P. Knowles, pro seipso.

Bradley, for the defendants.

By Court, AMES, C. J. The construction of 4 Anne, c. 16, sec. 27, confining the action of account, as between joint tenants and tenants in common and their representatives, to actual receipts by one or more of a greater share or proportion of the profits than has been received by the pursuing co-owners, is quite too narrow for the language employed by the general assembly in the corresponding statute in our own digest. By our statute, R. S., c. 209, sec. 1, the action is given, as between all co-owners of property, real or personal, and their representatives, where "one or more of the owners of such common property shall take, receive, use, or have benefit thereof in greater proportion than his or their interest therein;" and the account to be rendered is of "the use and profit of such common property." The concluding words of the section, "for receiving more than his or their part or proportion," are thrown back for their meaning to the preceding part of the section by the immediately succeeding words, "as aforesaid." In this respect, as well as in remedying the injustice of the common law, which permits one part owner of a chattel to exclude his co-owner from the use of the joint property without liability to account, it is obvious that our statute takes a much wider range than that of Anne, and that the cases cited on the part of the defendants bearing upon the construction of that statute, and of statutes conceived in similar terms, have no application to ours.

The defendants exclusively used the manufacturing establishment embracing real and personal estate, in which the plaintiff's intestate was jointly interested with themselves, in a business of the profits of which he could claim no share, and to the losses of which, consequently, he ought not, in any form, to be subject. Under such circumstances, the rentable value of the estate, as in an ordinary action for use and occupation, affords the fairest and most palpable test of the value of the use of the interest in it represented by the plaintiff. Any other would subject the plaintiff to the fluctuations of a business in which he has no concern, or open an investigation into the mode in which the defendants managed their own affairs, of which the plaintiff can know nothing, with a view of ascertaining what profits they might have made during the term in the

manufacture of cotton cloth, had they managed with due care and skill. As this test was adopted by the auditor in arriving at his result, his report must be confirmed with costs, and with interest on the amount found by him to be due to the plaintiff at the date of the report.

LIABILITY OF CO-TENANTS TO ACCOUNT: See *Izard v. Bodine*, 69 Am. Dec. 595, note 598, where other cases are collected; *Huff v. McDonald*, 68 Id. 487, note 492.

GREENE v. MUMFORD. SIMMONS v. MUMFORD.

[5 RHODE ISLAND, 472.]

COURT OF EQUITY WILL NOT ENJOIN COLLECTION OF GENERAL TAX OF of a sidewalk tax of a city, on the mere ground that the tax was illegally assessed against the complainant, and that his real estate has been levied upon, and is about to be sold for its payment, where no special equities are shown, and the law affords an adequate and more appropriate remedy.

BILLS in equity. The opinion states the cases.

Clarke, city solicitor, in support of the demurrers.

James Tillinghast and R. W. Greene, for the complainants.

By Court, AMES, C. J. These are applications to us, as a court of equity, to enjoin the collector of taxes of Providence from collecting of the complainant, in one case, a tax upon his personal property, and of the complainants in the other, a sidewalk tax, solely upon the ground that the taxes have been illegally assessed, and are therefore void. They pretend no special equities as grounds for relief, but proceed upon the general notion that wherever a public officer is about to act to the injury of another, or at least to sell his real estate under a void authority, a court of equity will enjoin the act, on account of the greater justice which is done by preventing than by afterwards remedying the wrong.

We do not understand that courts of equity take jurisdiction and enjoin upon any such loose and general notions; which, if carried out, would take a vast number of cases, turning upon legal rights only, out of the course of the common law, and subject them to the peculiar practice and mode of trial of the chancery. Certainly, it is not the mere fact that a public officer is attempting to exercise a void authority which induces a court of equity to restrain him; but notwithstanding he is a public officer, that he is about, by such exercise, to do an act

which brings the case within its peculiar jurisdiction; for example, an act in breach of trust, in derogation of a contract which ought to be specifically performed, or an act of irreparable mischief to the real estate of another. The jurisdiction is thus explained by Lord Cottenham in *Attorney-General v. Forbes*, 2 Myl. & Cr. 123, 130-135, in application to a public nuisance about to be committed under an order of the quarter sessions of the county of Berks; the authority of the magistrates being objected to the interference of the court. It is true that in *Frewin v. Lewis*, 4 Id. 249, S. C., 9 Sim. 6, in which he was asked to enjoin the poor-law commissioners from exercising certain powers over property which were claimed to be unauthorized, his language is more general, but the notion conveyed is nevertheless the same; and that is, that if public functionaries assume a power over property which the law does not give them, a court of chancery no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority: See also Adams's Eq. 212, and cases cited.

Treating, then, the tax collector in these cases, so far as he acts without authority, as a person about to commit an illegal act, what ground is there for the interference of this court, considering the nature and consequences of the act which he proposes to do? If, by any act done under his warrant, the collector exceed its precept, he is a trespasser and liable as such. If the tax is illegal and void, and is extorted from the person rated by the duress of the collector's warrant, it may be recovered back, with interest, in *assumpsit*, from the city; or, if the tax-payer choose, he may allow the collector to proceed under his warrant, and treat the assessors who issued it as trespassers, and recover of them all damages done to him in person or property under it. Pursuing these remedies, which seem quite adequate, the questions of law which arise in such a case are cheaply decided, as they should be, by a court of law; and the questions of fact, as they should be, by the verdict of a jury.

It is said, however, that if the collector is allowed to sell the real estate of the complainants for illegal taxes, they run the risk of losing their land sold, and at all events a cloud is cast, as the common phrase is, upon their titles to it; and it is true that the cases of *Van Rensselaer v. Kidd*, 4 Barb. 17, *Livingston v. Hollenbeck*, Id. 9, *Sayre v. Tompkins*, 23 Mo. 443, and *Lockwood*

v. *St. Louis*, 24 Id. 20, although they deny the propriety of the interference of a court of equity with the collection of a void tax when the person or personal property only is proceeded against, seem to admit it when such a tax is attempted to be levied upon the real estate of the person illegally rated.

Looking at our system of tax laws, we do not see the force of this distinction. The cloud upon title cast by a sale under a void tax is too easily dispelled to occasion injury, or even serious embarrassment; and the risk run by a person who deems himself illegally taxed, if the sale is allowed to proceed, is too small, in comparison with the evils of such interference, to justify a court of equity, without special grounds, in enjoining the sale. If the tax be really void, the title is not affected by the sale made to satisfy it; and if the rated person does not like to run the risk of its being void, he can pay it in relief of his land, and, if successful in showing its invalidity, recover it back, with interest, in an action of *assumpsit*. But if such payment be, from any cause, inconvenient, the risk he runs is reduced by our statute to this, that in the event he is mistaken as to the invalidity of the tax, he, "his heirs, assigns, or devisees," will be obliged to redeem the land sold "upon repaying to the purchaser the amount paid therefor, with twenty per cent in addition, within one year after the sale, or within six months after final judgment has been rendered in any suit in which the validity of the sale is in question, provided said suit be commenced within one year after such sale:" R. S., c. 40, secs. 16, 17, p. 111. If we take into consideration that, by the eleventh section of the same chapter of the revised statutes, "so much" only of the land liable to taxes is to be sold by the collector "as is necessary to pay the tax, interest, costs, and expenses," it is seen that the cloud upon title cast by a tax sale may, in the worst event for the tax-payer, be dispelled by redemption, at a far easier rate than by the additional expenses of a suit in equity over those of a suit at law, especially if, as would be the strict course where a mere legal right was in question, disputed facts were to be settled by verdict, upon an issue directed to a court of law.

On the other hand, if we sustain such bills as these, what must be the consequence? Constant application to this court to enjoin collectors of taxes upon the ground of illegal assessment at great expense, and with great vexation and delay, in a class of cases, too, in which the law from motives of public convenience, not to say necessity, has studiously made the

ordinary proceedings as short, as simple, as cheap, and effectual as possible. It has been argued to us, indeed, that because no special remedy is provided by statute for cases of illegal and void assessment, we should adopt this, though the most expensive and dilatory. We do not feel the force of the argument, considering the opposite scope of the general policy, and the minute provisions of our tax laws. In case of a petition by way of appeal from an over-valuation of the rated estate of a tax-payer, the eleventh section of chapter 39 of the revised statutes expressly provides that "no such petition shall, before judgment, stay any proceedings for collecting the tax." Still less are we, before judgment at law, as has been done in one of these cases, to stay the collection of a tax upon the ground that it may have been illegally assessed, and by entertaining in this form mere questions of law, unnecessarily to substitute, in effect, the most cumbrous and expensive for the most cheap and expeditious mode of collecting taxes, to the great burden of tax-payers and collectors of taxes, and to the great inconvenience of the public.

Nor do we feel the force of the distinction attempted upon the Ohio cases between equitable interference in case of a general and in case of a special town or city tax. Both derive their authority from the same source, and are necessary in legal presumption for proper municipal police. Though assessed in a different mode, and upon a different principle, and by a different set of officers, both are ultimately collected in the same manner; nor do we see how the threatened sale, or sale of his real estate, for the collection of the one can be more injurious to the person illegally assessed than for the collection of the other. As we have seen, a court of equity, in considering whether it shall interfere with the illegal acts of public officers, or *quasi* public officers, over property, does not look to the special mode in which their authority is conferred; since, so far as they exceed their commission, it treats them as persons dealing with property without any authority whatsoever. It looks only to the nature and consequences of their illegal acts done or proposed to be done; and in view of the sufficiency of legal remedies for a mere legal wrong, balances the advantages against the disadvantages of its interfering by its extraordinary power of injunction. If it is clear that more harm than good will be done, in a novel case, by such interference, it will stay, and ought to stay, its hand; not denying remedy, but leaving the injured party to his remedy at the

common law. Judging by these tests, we can see no more propriety for our enjoining the collection of a sidewalk tax than of a general tax.

In conclusion, although we will not say that in no case that may occur will we, as a court of equity, stay the collection of an illegal town or city tax, yet we do say that we will not do it as against a single tax-payer, upon the mere ground that it is illegally assessed upon him without special equities, and when, as in the cases before us, the law affords a far better and more appropriate remedy in view of his rights and necessities and those of the public than any which we, on this side of the court, can administer.

The demurrers must be sustained, and the bills dismissed with costs.

INJUNCTIONS TO RESTRAIN COLLECTION OF TAXES AND ASSESSMENTS: See *Holland v. Mayor etc. of Baltimore*, 69 Am. Dec. 195, note 198, where this subject is fully discussed. A court of equity will not interfere by injunction to stay the collection of a city or town tax on the application of a single tax-payer, upon the mere ground that it is illegally assessed, without special equities, the remedy at law being sufficiently adequate and more consonant with the provisions of the tax laws: *Sherman v. Leonard*, 10 R. I. 470, citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *St. Mary's Church v. Tripp*, 14 R. I. 810, to the point that money compulsorily paid for a tax which is void for illegality may be recovered back in *assumpsit*.

BANK OF THE REPUBLIC v. CARRINGTON.

[5 RHODE ISLAND, 515.]

PROMISSORY NOTE INDORSED OVER AS COLLATERAL SECURITY FOR PRE-EXISTING DEBT is, if received by the creditor before the maturity of such note and without notice, indorsed for a valuable consideration in the usual course of business, and may be held discharged of the equities between the original parties thereto.

ASSUMPSIT against the makers of a promissory note which had been indorsed to the plaintiff as security for a pre-existing debt. The facts appear from the opinion.

T. A. Jenckes, for the motion for a new trial.

Tillinghast and Bradley, contra.

By Court, **BOSWORTH, J.** The question arising in this case is one in reference to which there has been much diversity of opinion and decision in the American courts.

The ruling at *nisi prius*, to which exception is taken, was,

“that a note indorsed over as collateral security for a pre-existing debt, if received by the creditor before the maturity of the collateral note, and without notice, was indorsed for valuable consideration, and might be held discharged of the equities between the original parties.”

In the consideration of the question which we have to decide, we may assume that there is a general doctrine relating to the transfer of negotiable instruments before they become due recognized by all the authorities, and as well settled as is any other general principle of the law; and that is, that such instruments, taken *bona fide*, without notice of anything to impeach their validity, in the usual course of trade and business, and for a valuable consideration, are held unaffected by any facts that might injure or destroy their validity between antecedent parties. The note here was indorsed before its maturity and without notice, as the record implies. Nothing is suggested to impeach the *bona fides* with which it was taken by the indorsee. The questions which remain are, whether it was taken for a valuable consideration, and whether it was taken in the usual course of trade and business.

We think it may now be considered settled that when a negotiable instrument is taken in payment or extinguishment of a pre-existing debt, it may be held discharged of equities existing between prior parties. This doctrine, although for a time doubted, and by some of the courts in this country denied, has now become so generally accepted as to entitle us to consider it a settled point of general law. The case of *Swift v. Tyson*, 16 Pet. 15-22, expressly decides this point; and the New York courts, which at one time inclined to support a contrary doctrine, by their later decisions seem tending to support the same point, as an unavoidable conclusion.

The question involved in this case is, considering the weight of authority arrayed on either side of it, a more involved and doubtful question; and yet were the point a new one, we should have felt no difficulty in determining that a conveyance or transfer of a negotiable instrument, as well as of any other property, as security for an existing debt, was as much in the usual course of trade and business, and as really for a valuable consideration, as would be an absolute conveyance or transfer of such an instrument in payment of such a debt. It certainly would seem that payment of existing debts should be in the usual course of business; and where it is inconvenient that debts shall be paid, it ought not to be out of the usual course

of business that such debts should be secured, if security be asked. The indorsing over of a note for the purpose of paying a debt ought to be held as much for valuable consideration as the transferring it for a new purchase; and the indorsing over of such a note for securing a debt heretofore contracted, as for one presently incurred.

It is held by the courts, with scarcely any exception, that the transferring of a note to secure payment for a present purchase is in the usual course of business. And why is it not so when transferred to secure a debt due, and which ought to be paid or secured before new liabilities are contracted? On the ground of importance for commercial purposes, we do not see why negotiable instruments should not have credit and currency for the payment of and for securing debts, as well as for the purchasing of goods or the raising of cash. It is often quite as important to business men, in commercial transactions, that they should be able to pay or secure their debts, and make use of current paper for these purposes, as it is that they should make new purchases, or sell such paper sometimes at ruinous sacrifices for the purpose of raising money with which to pay their debts. The transaction which the facts show in this case is not an unusual one, and is one which, in the nature of things, it is reasonable to suppose might often occur in the convenient conduct of ordinary commercial business. The party by whom this note was indorsed was indebted to the bank, and the bank required a settlement of his account. It was not important to the bank that the money should be paid, if it could be continued on interest, and good security could be given. It was in the usual course of their business to accommodate their customers, if, by prolonging their credit, they could loan their money anew, and be secure of ultimate payment. A new note was given, payable on demand, and this collateral note, payable on time, was pledged as security. Was not this for valid consideration, and in the usual course of business? The proceeds of the new note were placed to the credit of the maker on the books of the bank, and thus the account which they had required to be settled was balanced. It cannot be contended that there was not such a consideration here as would make the transfer of the collateral note valid between the immediate parties; and if valid between them, why does not the doctrine of credit and currency of negotiable instruments transferred before maturity, without notice and for value, apply, with its legitimate consequences, to antecedent parties, as in all other cases?

It is said in some of the cases, that where one receives a note for a pre-existing debt, he parts with nothing, and is in the same situation, after a successful defense by the maker, that he was before he took the note; and therefore it is argued that in a case where a note is fraudulently put in circulation, the greater equity is in favor of the maker. But how can we say this? If the holder had not relied on the security, how do we know that he would not have insisted upon other security or upon the payment of his debt? If this note had been negotiated with another party for cash, and with that the note had been paid, there would have been no question that the holder of the note would have been discharged of the equities of prior parties.

It is not reasonable to suppose that the party demanding a settlement of the debt would have rested quietly had not security been given; and how can we say that if the holders of the note had not given faith to the collateral note, they would not have found other means to obtain payment of the debt? As to the equities of the case, as between the maker and the holders of the note, it may with propriety be asked whether it is more equitable that the party who set the note afloat, with all the marks of credit and currency upon its face, should suffer the loss consequent upon his act, or that the loss should be suffered by one who has taken it *bona fide*, as security for a debt due, relying upon the marks of credit and currency which the maker himself has put upon it. In truth, can we decide, or ought we to determine, in a suit at law, upon these doubtful equities in such cases, while the commercial world is doing business in the faith that there are established rules of law, giving to negotiable instruments credit and currency, when negotiated before maturity?

So far as we have been able to ascertain from an examination of the English decisions, there is no case in which it has been decided that current negotiable paper, taken as collateral security for a prior debt, is not taken for value, and in the usual course of business. In the case of *Poirier v. Morris*, 20 Eng. L. & Eq. 103, it seems to have been held that such a transfer is valid according to English law. Lord Campbell, C. J., in giving the opinion in that case, says: "There is nothing to make a difference between this and the common case, where a bill is taken as security for a debt; and in that case an antecedent debt is a sufficient consideration." The American courts are quite divided upon this point. The leading case in support of the doctrine that a note negotiated as collateral security for

a precedent debt is not taken for value, *Coddington v. Bay*, 20 Johns. 637 [11 Am. Dec. 342], was an extreme case, and is such a decision as might, perhaps, be sustained without resort to the broad principle there laid down, that such a note taken *bona fide*, and without notice, is subject to equities existing between the original parties. There was in that case not only a gross fraud in the transfer of the note, but it seems to have been taken after the known insolvency of the indorser, and as collateral security for contingent liabilities with which the holders had not then become charged. Whether such circumstances might not reasonably be held sufficient to put the holder upon inquiry at the time so as to affect the *bona fides* of his taking the note, may well be questioned. Be this as it may, it seems to have been held in New York, after that decision, that a transfer of a current note for a precedent debt was not sufficient to shut out the equities between prior parties in favor of the holder; and in this doctrine the courts of several other states concur.

The contrary doctrine is, however, maintained in the courts of Massachusetts, Connecticut, Pennsylvania, Georgia, Alabama, North Carolina, and New Jersey. Chancellor Kent, who first decided the case of *Coddington v. Bay*, which is affirmed in 20 Johnson, in his commentaries, vol. 3, p. 96, adopts the rule recognized by these courts as the plainer and better doctrine. The deliberate and well-considered opinion of the case of *Swift v. Tyson*, 16 Pet. 15, in the supreme court of the United States, delivered by Mr. Justice Story, upon a full consideration of the case upon principle, and after a review of all the cases up to that time, seems to establish the point with a weight of authority too overwhelming to be resisted. It is true, as is urged by counsel, that in many of the cases the question of taking negotiable paper as collateral security was not necessarily involved in the matter for decision; the cases, as in *Swift v. Tyson*, *supra*, presented only the question of taking such paper in payment of a precedent debt. But the courts all treat the question as if there was no difference, upon principle, between a note indorsed in payment and one indorsed for security. We think, however, that the same doctrine is maintained in a later case in the supreme court of the United States, where the point did arise, and was to the same effect decided: *Bank of the Metropolis v. New England Bank*, 1 How. 234. The precise point has also been decided in several other cases.

The latest case which we have seen in which the question has arisen is one in the supreme court of Vermont: *Atkinson*

v. *Brooks*, 26 Vt. 569 [62 Am. Dec. 592]. That was a case in its character exceedingly similar to the one before us. The opinion was delivered by Redfield, C. J. After giving his reasons for holding that a current note, indorsed over as collateral security for a pre-existing debt, without notice, may be held by the indorsee, discharged of the equities between antecedent parties, he reviews the authorities with great ability, and comes to the conclusion that his decision is sustained by the weight of the authority as well as by the reason and justice of the case. After a patient examination of all the cases which we have found in which the doctrine has been brought in question, we have come to the same conclusion. The exceptions in this case are therefore overruled, and a new trial refused.

AMES, C. J., did not sit in this case.

NEGOTIABLE INSTRUMENT TAKEN AS COLLATERAL SECURITY for pre-existing debt is not subject to equities between the original parties: See *Payne v. Bensley*, 68 Am. Dec. 318, note 321, where other cases are collected.

INDORSEE OF NEGOTIABLE INSTRUMENT TAKEN AS COLLATERAL SECURITY for a pre-existing debt is *prima facie* a holder for a valuable consideration: *Atkinson v. Brooks*, 62 Am. Dec. 592, note 602, where other cases are collected: *Trustees of Iowa College v. Hill*, 12 Iowa, 478; *Cobb v. Boyle*, 7 R. I. 553, both citing the principal case.

PAYMENT OF ANTECEDENT DEBT, AND RELEASE OF PARTIES COLLATERALLY LIABLE, is sufficient consideration to make a transfer of a note *bona fide*: *Emanuel v. White*, 69 Am. Dec. 385, note 387, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Fair v. Howard*, 6 Nev. 310, to the point that there is no difference between a pre-existing debt and a fresh loan or advance of money.

CASES IN EQUITY
IN THE
COURT OF APPEALS AND COURT
OF ERRORS
OF
SOUTH CAROLINA.

McCLELLEN v. HETHERINGTON.

[10 RICHARDSON'S EQUITY, 202.]

EXECUTOR IS ENTITLED, AS SUCH, TO HIS COUNSEL FEE EXPENDED IN ESTABLISHING WILL before the ordinary in solemn form; but if he is also a devisee and legatee, the devise and legacies to him are chargeable with such fee and other expenses, ratably in proportion to the value of the estate.

EXCEPTION to the commissioner's report, on the ground that he erred in not allowing a credit of five hundred dollars to defendant, as executor, for establishing testator's will. The remaining facts are stated in the opinion.

Smith, for the appellant.

Clawson and McAliley, contra.

By Court, **WARDLAW**, Chancellor. The brief in this case is long, but while it contains much superfluous matter, it omits some of the materials of a satisfactory judgment; particularly the commissioner's report of June, 1856, which was the basis of Chancellor Johnston's decree now appealed from. The first ground of appeal objects that the chancellor allowed the defendant, as executor, a credit of five hundred dollars as counsel fee paid to establish the will of testator, when it appears by the provisions of said will that he was in fact litigating in his own right and for his own interest. It seems that the testator devised to the executor all his land, worth about six thousand dollars, and at least an equal portion of his small personalty, and that the executor had notice before probate, in common form, that the validity of the will would be contested.

The case is distinguishable from those previously decided on this "perplexing doctrine." In *Wham v. Love*, Rice Eq. 51, the ordinary duties of the administrator had been discharged, and he was refused credit for his expenses in resisting, unsuccessfully, the title of the plaintiffs to the fund for distribution in his hands, in behalf of himself and other defendants in the same interest; his expenditure was not for the maintenance of his fiduciary relation, but for his own gain. In *Atcheson v. Robertson*, 4 Rich. Eq. 39, allowance was made to an executor for a fee paid to counsel, partly for resisting just claims of the legatees; but this was because the legatees received the benefit of a mortgage taken by the executor for his own security, and it would have been plainly unjust to deprive him of his title for the benefit of the legatees generally, without reimbursing him for his expenses honestly incurred.

In *Butler v. Jennings*, 8 Rich. Eq. 87, which is most analogous of the cases to the present, an executor was allowed his expenses in attempting to establish a will in due form of law after it had been admitted to probate in common form, but it did not distinctly appear there that the executor took any interest under the will. The principle to be deduced from all the cases is, that the representative should be reimbursed from the estate for the expenses he has incurred in litigation fairly falling upon him in his character of trustee; especially where he has been successful, although he may have some interest in the subject of suit. He should have credit for all expenditures for the preservation and benefit of the estate, as for fees to counsel, for general advice in the administration of the estate, for resisting doubtful claims, for clearing out incumbrances, for obtaining the instruction of the court in a proper case, for settlement of the estate, and like services. In *Butler v. Jennings*, 8 Rich. Eq. 87, some reliance in the judgment was put on the fact that the litigation concerning the will was stirred after the title of executor had been conferred on the defendant by the ordinary; but one nominated executor may perform many acts in that character before probate, and is under obligation to set up what he really believes to be the will of his deceased friend and testator; and if the result proves that his belief was just, he ought not to sustain the cost of establishing the will from his own pocket. We are content, then, in this case, that the counsel fees should be paid out of the estate; but, as we understand the matter, the commissioner in his last report throws the whole burden of this expenditure on the other legatees, in exoneration of the executor, at least to the extent of his devise. That is considered an unjust

result. In payment of the debts of a testator or intestate and the ordinary expenses of administration, resort is properly had primarily to the personal estate, but this case is exceptional. The executor was litigating with the other legatees mainly for his own benefit, and partly before he assumed the office; and it is not just that they, in addition to payment of their own counsel, should sustain the whole burden of reimbursing him for payment to his counsel. It is adjudged that the executor here is not entitled to exoneration for payment to his counsel of that part of the fee which is proportionate to the value of the estate devised and bequeathed to him; and it is ordered that the commissioner reform his report so as to make it a burden on all the legatees ratably to the value of their shares.

The second ground of appeal relates to the hire of the slave Daniels for the years 1852, 1853, and 1854, and suggests that the chancellor was mistaken in supposing that the slave for these years was in possession of James Hetherington, and not hired out by the executor. The commissioner originally allowed this hire, and the chancellor disallowed it; but recommended the report, with very proper instructions to the commissioner to charge the executor, where he had hired the slave to another person than James H., and had received, or ought to have received, the hire, and had not accounted with James H. before notice of the latter's assignment. There was evidence at the former reference that this slave had been hired for two of these years, although it did not appear by whom or to whom or at what price he was hired. At the latter reference, Crosby, assignee of James, offered additional evidence on the subject, and the commissioner refused to receive it, because, as he supposed, the chancellor had concluded the point. We do not so interpret the decree, and think the commissioner should have received the evidence. It is ordered that the report be committed to the commissioner as to this matter.

On the questions of fact brought under review by the third ground of appeal, we do not perceive, in the dim light afforded by the brief, any error in the chancellor.

It is ordered that the decree be modified as hereinbefore directed, and in other respects be affirmed.

DUNKIN and DARGAN, chancellors, concurred.

Decree modified.

EXECUTOR, RIGHT OF, TO REIMBURSEMENT FOR COUNSEL FEES EXPENDED IN ESTABLISHING WILL: See *Henderson v. Simmons*, 70 Am. Dec. 590, and cases cited in notes.

MILLER v. LAW.

[10 RICHARDSON'S EQUITY, 320.]

COMMISSIONER HAS DISCRETION TO WITHDRAW LAND FROM SALE, after it has been offered, and even after a bid has been received and cried, and if he does so, the highest and last bidder is not entitled to a conveyance, there being no contract with him. The commissioner's discretion, however, is subject to the control of the court in this regard.

MOTION to require commissioner to show cause why the bid of one Mayrant should not be set down and entered as the last and highest bid at a partition sale, and why he should not make title to Mayrant in compliance with the terms of sale. The commissioner answered, admitting that Mayrant had made the highest bid, but submitted that as it was in his discretion to accept the bid or not, and as the bid was not sufficient to satisfy the costs and fees, he had not accepted the bid, and that Mayrant had no rights till his bid was accepted. The motion was denied and rule refused, and Mayrant appealed.

Moses, for the appellant.

Bellinger and Law, contra.

By Court, JOHNSTON, Chancellor. Whether the commissioner rendered himself liable, as for misconduct, in refusing to keep up the biddings, and to close a contract with Mr. Mayrant upon his bid, or not, it is certain that no contract was closed with him; and he is not entitled to have a conveyance either under a rule, or under a bill exhibited for that purpose.

But it is the constant practice to allow commissioners to withdraw property, temporarily, from sales, when they see that to press the sale would be to sacrifice the property. I am of opinion they should have this discretion, under the control of the court. It may be liable to abuse; in which case the court can control it by peremptory orders, or otherwise. But on the other hand, when judiciously exercised, as in this instance, it is most wholesome.

It is ordered that the appeal be dismissed.

DUNKIN, chancellor, concurred.

Appeal dismissed.

MOORE v. WILLIAMSON.

[10 RICHARDSON'S EQUITY, 522.]

ON PARTITION OF LANDS, IMPROVEMENTS ARE NOT ALLOWED FOR ACCORDING TO THEIR COST, but according to the value which they have imparted to the premises.

PARTY DISSATISFIED WITH APPRAISEMENT BY COMMISSIONERS IN PARTITION of land to be assigned to another may bring the property to a sale by securing and making a bid, offering a material advance in price over such appraised value.

BILL for partition. On the commissioners' return, plaintiff excepted thereto: 1. Because the improvements were not properly assessed; 2. Because in allowing certain lands to one of the parties they had been assessed too low, plaintiff accompanying the latter objection with an offer of an advance of five hundred dollars on the assessed value. The opinion sufficiently states the further facts.

Williams, for the appellants.

Moore, contra.

By Court, JOHNSTON, Chancellor. Nothing is better settled in our practice, not only in cases of intestacy, but in cases under contract, as may be seen in the case of *Stoney v. Schultz*, 1 Hill Ch. 465 [27 Am. Dec. 429], than that where the value of improvements is to be computed in a division, the process is to allow, not the cost of the improvements, but the value they impart to the premises. Whatever may be the rule in other states or countries, this is our rule, and may be traced back as far as 1832, if not to an earlier time. A rule to allow the cost of improvements would subject the owner of the premises to the want of judgment or economy of the improver, and render him liable to be built out of his land by the improvidence of his tenant.

It is equally a notorious practice in partition cases that a party dissatisfied with the rate at which land is recommended to be assigned to another party may shake the proposed assignment, and bring the property to a sale, by making and securing a bid for a material advance in price over the value assessed by the commissioners. The court would not attend to an insignificant advance, since such a practice would tend to hang up causes indefinitely, without sensibly promoting the justice of cases; but wherever the advance is for the substantial ben-

efit of all the parties interested in the partition, the court is bound to attend to it.

It is ordered that the appeal be overruled and the decree confirmed.

DUNKIN and WARDLAW, chancellors, concurred.

Appeal dismissed.

PARTITION, ALLOWANCE FOR IMPROVEMENTS: See *Robinson v. McDonald*, 62 Am. Dec. 480, and extensive note thereto 483, 487, citing many cases.

JUDICIAL SALE OR APPRAISEMENT, SETTING ASIDE WHEN ADVANCE BID OFFERED: See *Roberts v. Roberts*, 70 Am. Dec. 435, and note.

WILLIAMS v. NEEL. FLOYD v. NEEL.

[10 RICHARDSON'S EQUITY, 333.]

CREDITOR'S BILL TO SET ASIDE DEEDS OF GIFT made at various times to defendants, the several children of a debtor, is not objectionable on the ground of multifariousness.

LEAVE TO AMEND BILL SO AS TO MAKE IT CREDITOR'S BILL will be granted at any time.

WHERE SEVERAL CREDITOR'S BILLS ARE INSTITUTED BY DIFFERENT CREDITORS, all will be stayed but one, and all the creditors will be allowed to come in under the decree in that suit.

BILLS filed by different creditors to set aside deeds of gift made at various times by Neel to his children. Defendants demurred for multifariousness. The demurrer was overruled, and defendants appealed.

Fair, for the appellants.

Jones and Garlington, contra.

By Court, DUNKIN, Chancellor. These causes were heard together. The former bill is stated to have been filed in August, 1857, the latter in November of the same year. To both suits the defendants demurred for multifariousness. All the plaintiffs are stated to be creditors of George Neel, who is alleged to be insolvent. The charges are that at various times he made voluntary gifts of property to his children, the several defendants, who are alleged to be in possession of the same. The purpose of the plaintiffs is to set aside the deeds and subject the property to the payment of the grantor's debts. No actual or intentional fraud is charged on any of the parties. The principle is very well established that "where the inter-

ests of the plaintiffs are the same, although the defendants may not have a co-extensive common interest, but their interests may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them:" Story's Eq. Pl., sec. 534. Upon this principle, it has been held that "distinct and several judgment creditors may join in one bill for discovery and relief to set aside conveyances which have been made by their debtor in fraud of his creditors—for they all have a common interest in the suit; and if they succeed, the decree will be beneficial to all in proportion to their respective interests:" Id., sec. 537 a.

In addition to these general reasons, it may be added that it is a favorite object of equity jurisdiction to do complete justice and prevent a variety of litigation. If the allegations of the plaintiffs should be successfully maintained, in administering the proper relief, the court may deem it necessary to have the several donees before them in order to adjust the equities which may arise among themselves: See *Screven v. Joyner*, 1 Hill Ch. 252 [26 Am. Dec. 199]; *Thompson v. Murray*, 2 Id. 204 [29 Am. Dec. 68]. The court is of opinion that the demurrers in both cases were properly overruled.

In the case first entitled (*Williams v. Neel*), the second ground of appeal is, that if the bill be not multifarious, yet the demurrer should have been sustained and the bill dismissed, on the ground that it should have been a "creditor's bill." But no such objection appears in the ground of demurrer, which is for multifariousness only. Upon such objection being taken, it is not unusual for the court, at any time, to give leave to the plaintiff to amend his bill in this respect if it be deemed necessary; or, as suggested by the chancellor in *Hallett v. Hallett*, 2 Paige, 18, 19, "if several suits are pending in favor of different creditors, the court will order the proceedings in all the suits but one to be stayed, and will require the several parties to come in under the decree in such suit, so that only one account of the estate may be necessary." But all this is matter for the circuit court, and not for this tribunal.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON and WARDLAW, chancellors, concurred.

Appeal dismissed.

CURETON v. DOBY.

[10 RICHARDSON'S EQUITY, 411.]

CONFESSION OF JUDGMENT BY DEBTOR TO BONA FIDE CREDITOR IS NOT FRAUDULENT as against other creditors, because of the mere fact that the debtor knows that such creditor intends to settle the larger portion of the debt on the debtor's family.

BILL to set aside as fraudulent a confession of judgment by defendant to his debtor, Doby. The chancellor ordered the judgment set aside. Defendants appealed.

Moore, for the appellant.

Cooke, contra.

By Court, DUNKIN, Chancellor. The defendant Doby, having been long the indulgent creditor of Henry R. Price, had removed to the west. Hearing of Price's pecuniary embarrassments, and "influenced [as he says in his answer] as much by his solicitude for the welfare of the family of Price, who was nearly related to him by marriage, as to secure the payment of his debt, he came on a visit to Lancaster, in June, 1855, on this and other business." Before his return home, to wit, on the twenty-third of June, 1855, he left a power of attorney with David M. Crockett, to collect all his debts, and particularly that due by Henry R. Price; and to procure, if he could, a confession of judgment from Price for his debt, and to lodge execution; and if such execution should be older than any except those already existing against Price, and his property should be brought to sale, he authorized his attorney to bid off the property to the extent that the proceeds of sale might be applicable to his execution, and to settle the same, with the exception of one tract of land, to the sole and separate use of Nancy Price, the wife of the said Henry R. Price, during her natural life, and after her death, to her daughter, Henrietta, in fee. On the tenth of July, 1855, Price confessed a judgment to Doby for four thousand seven hundred and thirty-nine dollars and fifty-four cents, with interest from the thirteenth of December, 1851, on a demand which the pleadings admit to be justly due to him. On the fourteenth of July, 1855, he confessed another judgment to him for six hundred and forty-eight dollars, which, the answer states, was omitted by mistake, but which the plaintiff charges was not due, "as he is informed and believes that the former judgment embraced all that Price owed him."

Under various executions, Price's property was brought to

sale by the sheriff on the third of December, 1855. The aggregate of Doby's debt was six thousand seven hundred and fifty-four dollars and forty-nine cents. Both Price and Doby deny any agreement on which the judgment was confessed, but Price says that he was aware of the power of attorney, and that "after this manifestation of generosity on the part of Doby, he admits that he more cheerfully confessed the judgment;" but he denies that the confession was made with any fraudulent intention, and submits that the arrangement proposed by Doby has not operated to the injury of the plaintiff or of any other creditor. The sales made in December, 1855, and afterwards, amounted to a larger sum than was necessary to pay the debt of Doby, as well as the prior executions, but not enough to reach the junior execution of the plaintiff. There is no suggestion that the property did not bring its full value. Crockett, the attorney of Doby, purchased at the sales seven negroes, one of whom afterwards died, and he states in his answer that he hired four to Price and two to another person. The fraud in the confession of judgment is alleged to be established by the provision which Doby was to make for the wife and family of Price. Of course, it is equally fraudulent or innocent whether Doby's agent did or did not afterwards purchase, at the sheriff's sales, any part of the property. With the exception of the value of the negroes (three thousand three hundred dollars), the amount of Doby's judgments has been reserved by Crockett, his attorney, or is subject to his order. The plaintiff alleges that the amount reserved by Doby for himself did not exceed two thousand dollars, and that the surplus of the amount due on the judgments (probably some five thousand dollars) is settled, or to be settled, on the family of Price.

Certainly a judgment may be fraudulent though the amount for which it is confessed be *bona fide* due. This principle is recognized in *Bird v. Aitken*, Rice Eq. 73, as where one renders assistance to a debtor to enable him to defraud his other creditors, this is a fraud upon the part of him who assists. The *bona fides* of his own debt will not sanctify the transaction, and *Pickett v. Pickett*, 2 Hill Ch. 470, is cited as a striking illustration, in which a *bona fide* purchaser assisted an absconding debtor in eluding his property. But in the same case of *Bird v. Aitken*, *supra*, it was authoritatively adjudged that the mere fact of securing a preference of his own debt by a confession of judgment "does not constitute an unlawful or fraudulent hinderance as to the unpreferred creditors." "It cannot be

doubted," says Chancellor Harper, "that the mere preference of one creditor to another cannot impeach the transaction; and if there were nothing else in this case than that Aitken had given a voluntary preference by confessing the judgment, that could not be impeached, though he might have foreseen that the effect would be to defeat other creditors. That would not be a fraudulent but a lawful purpose. There is no fraud either in the debtor or the preferred creditor." The court of appeals affirmed the doctrine, and furthermore held that there was nothing in that case to invalidate the transaction. While the law thus allows the debtor to give a preference among his creditors, it will not allow him to secure an advantage to himself at the expense of creditors, as the price of such preference—that, in every case, the inquiry should be as to the rights of the creditors; and in preserving those rights, care should be taken that an act of spontaneous kindness and indulgence on the part of the creditor be not confounded with fraud in the debtor. The best feelings should not be chilled and stifled by an overweening tendency to detect collusion. "My own experience," said the late wise and venerable president of this court, in *Maples v. Maples*, Rice Eq. 300—"my own experience is, that a great deal of fraud is committed in carrying out the rules which have been prescribed for its prevention."

In this case Price expected and believed that, if his property should be sufficient to reach and satisfy the execution, his humane and generous creditor would settle upon his family the larger part of the money to be realized. If there were any question of the reality and *bona fides* of the debt, such unwonted liberality might provoke suspicion. But it is substantially conceded that the debt was justly due. The debtor's property was exposed to public sale, brought a fair price, and the proceeds have been applied to the discharge of this and older execution creditors. At what expense, then, of the junior creditors is it that an advantage is given out of the proceeds of sale to the family of the debtor? The larger portion of the property must have been purchased by strangers, and a considerable portion of the fund belonging to the defendant is still in the hands of the sheriff. If the defendant thought proper to give it to a third person or to a charitable institution, no one would doubt his right, nor would any unpaid creditor of Price surmise that the defendant's liberality had been exercised at his expense. Nor is it any more at his expense that the family

of Price have been the objects of his bounty. The transaction is yet incomplete. The money is not yet paid over to the defendant's agent, and the settlement has not, consequently, been yet made. But this court considers that as done which is agreed to be done. The property, whatever it be, is held subject to the terms of the settlement. After the case of *Arundell v. Phipps*, 10 Ves. 140, and our own case of *Maples v. Maples*, Rice Eq. 300, it will not be contended that a possession is fraudulent which is in accordance with the terms of the deed.

It is ordered and decreed that the decree of the circuit court be reversed, and that the bill be dismissed.

JOHNSTON and WARDLAW, chancellors, concurred.

Decree reversed.

JUDGMENTS BY CONFESSION, VALIDITY OF, AND IMPEACHMENT FOR FRAUD: See *Dunman v. Hartwell*, 60 Am. Dec. 176, and note.

BOWERS v. BOWERS.

[10 RICHARDSON'S EQUITY, 551.]

MARRIAGE BETWEEN UNCLE AND NIECE IS VALID, at least to the extent that the wife may, after her husband's death, claim her distributive share of his estate.

MARRIAGE IS CIVIL CONTRACT IN SOUTH CAROLINA, and as such is not affected by canonical incapacity of the parties, arising from proximity of blood.

COURTS CANNOT DECLARE MARRIAGE VOID IN SOUTH CAROLINA by direct proceedings for that purpose; but such courts have power, when the question arises incidentally, to determine the validity of a marriage.

BILL by children of decedent by his former marriage for partition of his estate to them, on the ground that a later marriage between him and his niece was illegal by reason of their too close relationship, and that the latter was therefore not entitled to any part of his estate.

Moore, for the appellants.

By Court, DUNKIN, Chancellor. It is not questioned that the circuit decree of the court of equity is in conformity with the unanimous judgment of the law court of appeals in *State v. Barefoot*, 2 Rich. L. 209. Barefoot was indicted for bigamy, and the conviction was sustained upon the determination of the court that the marriage of the defendant with his aunt was valid by the laws of South Carolina. The avowed object of

the appeal is to obtain the review and reversal of that judgment.

Marriage in the state of South Carolina has always been regarded as a merely civil contract. For any civil disability, it may be treated as void by any judicial tribunal of the state. But the court of equity has no more authority over the subject than a court of law, and any attempt to exercise any greater or more extensive authority would be a simple act of usurpation. In *Mattison v. Mattison*, 1 Strobb. Eq. 387 [47 Am. Dec. 541], it was determined unanimously by the court of errors that in a suit between the parties to the marriage seeking to have the same declared void, the court of equity had no jurisdiction. But in a suit between third persons, arising in the court of law, the validity of the same marriage, impeached on account of an alleged civil disability, was fully examined, discussed, and determined.

The same power is familiarly exercised by the court of equity, as is illustrated by the case of *Foster v. Means*, Speers Eq. 569 [42 Am. Dec. 332]. All these inquiries relate, however, to some civil disability or other infirmity of that character in the alleged contract. But the incapacity in respect of proximity of relationship is a canonical and not a civil disability. Neither the court of chancery in England nor any of the law courts had cognizance of canonical disabilities. When parliament thought proper to interfere, and by the statute 5 & 6 Wm. IV., c. 54, declared that all marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity should be absolutely void, then the objection came within the cognizance of the courts of common law: 2 Steph. Com. 284. So when the legislature of South Carolina shall have prescribed within what degrees of relationship marriages shall be invalid, the law will be understood by the citizen and enforced by the courts. But by this appeal the court is invoked to recognize a principle which would not only declare void a marriage between uncle and niece, and of course bastardize their issue, but a marriage between a man and his wife's sister falls within the same category, and if the canonical mode of computation of the Levitical degrees be adopted, a marriage between first cousins is equally prohibited: See note to 2 Steph. Com. 284. On the other hand, extreme cases of unnatural alliances may be supposed, at which the moral sense would be offended, but hitherto public sentiment, if not private morality, has repressed all such evils. It is far

better to leave the legislature the appropriate duty of defining and prohibiting such evils, rather than arm the court of chancery with ecclesiastical powers on a subject of great delicacy and pervading interest.

But the proposition of the appellants could not be successfully maintained in any court of Great Britain, ecclesiastical or civil. Marriages within the Levitical degrees are not void, but only voidable. And even in doctors' commons you are not permitted to violate the sanctity of the tomb, and impeach for alleged canonical disability the validity of a nuptial contract which death has already dissolved. "Not only," says a learned commentator, "are marriages under these circumstances of disability esteemed valid, until there be actual sentence of separation, but they are permanently valid, unless such sentence be given during the life of the parties. For after the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void:" 2 Steph. Com. 280; *Bury's Case*, 5 Co. 98.

In the temporal courts such marriages are held valid for all civil purposes unless sentence of nullity be obtained in the lifetime of the parties: Shelford's Mar. & Div. 482. A marriage within the prohibited degrees, not avoided during the life-time of both parties, confers the civil rights of marriage, such as the right of dower, right of administration, etc.: Id. 179. And the author refers to Co. Lit. 33 b, where it is said "that if a marriage be voidable in respect of consanguinity, affinity, etc., whereby the marriage might have been dissolved, yet if the husband die before any divorce, then for that it cannot now be avoided; this wife *de facto* shall be endowed, for this is *legitimum matrimonium quoad dotem*." So in this case, it appeared that Edward Bowers, the husband, was dead, and the circuit decree properly adjudged to his widow, Elizabeth Jemima, one third of his estate under the statute of distributions.

It is ordered and decreed that the appeal be dismissed.

O'NEALL, WARDLAW, GLOVER, and MUNRO, JJ., concurred.

Appeal dismissed.

MARRIAGE, IMPEACHMENT AFTER DEATH OF HUSBAND OR WIFE: See *Gathings v. Williams*, 44 Am. Dec. 49, and note 54.

COURTS HAVE NO JURISDICTION TO DECLARE MARRIAGES VOID in South Carolina: See *Mattison v. Mattison*, 47 Am. Dec. 541.

BLANDING v. COLUMBIA.

[10 RICHARDSON'S EQUITY, 572.]

CONTRACT BY MUNICIPAL CORPORATION HAVING PERPETUAL CHARTER to pay a certain sum in town stock, bearing interest, and that "said stock shall be redeemable at the pleasure of the corporation after" a day fixed, is a valid contract, and gives the corporation the right indefinitely to postpone payment of the principal sum after the day fixed.

Bill in equity by plaintiff, praying that the city council of Columbia be required to redeem certain stock which it issued in favor of her testator. The remaining facts appear in the opinion.

Adams and Gregg, for the appellants.

Blanding and De Saussure, contra.

By Court, WARDLAW, Chancellor. The question presented for judgment in this case is strictly a legal question, dependent on the construction of a contract; and I suppose the case was referred to this court because the chancellors desired the advice and aid of their brethren of the law bench in deciding a matter of common law.

It is a narrow question, to be settled by the determination of two points: the intention of the parties in stipulating that the principal of an acknowledged debt should be payable at the pleasure of the debtor after a fixed day, the debtor contracting to pay a certain rate of interest for detention of the debt; and the lawfulness of a stipulation on the part of a local corporation for such postponement for an indefinite time of the payment of its debt.

The first point must be decided on the words of the contract. Abram Blanding agreed with the corporation of Columbia, June 13, 1835, to sell to the city the water-works he had erected at great expense, for twenty-four thousand dollars in town stock, bearing an interest of five per cent per annum, payable quarterly; i. e., on the tenth of each of the months of January, April, July, and October; the first payment of interest to be made in the month of October next. "The said stock shall be redeemable at the pleasure of the corporation, after July 10, 1855."

The scrip issued and accepted in fulfillment of this agreement pursues substantially the terms of the agreement, employing different words: "The principal of which stock is reimbursable at the pleasure of said corporation, after July 10, 1855." The difference between "redeemable" and "reimbursable" can

hardly be appreciated, and both words manifestly relate to the principal of the stock. The recital in the release from A. Blanding to the town, that twenty-four thousand dollars was secured to be paid to him, cannot vary the construction of the actual contract, because such recitals of consideration are always referential. In the form of release prescribed by statute, payment of the purchase-money is acknowledged; and in practice it is not usual in the recital of consideration in releases to proceed, beyond the acknowledgment of receipt of the price, to describe the particulars of the contract concerning the time and manner of payment. What, then, is the meaning of the contracting parties in stipulating that the stock for the price of water-works should be redeemable after twenty years at the pleasure of the corporation responsible for the price. In the construction of a contract in writing, it is the rule to consider the whole instrument, and to give effect to all the words in it which are not nonsensical, inconsistent, nor superfluous. It is indisputable that if any effect whatever be given to the words "at the pleasure of the corporation," they must refer to the exercise of the corporation's discretion after July 10, 1855; for before that date the council could not compel the creditor to accept payment, and the stipulation as to the pleasure or discretion of the corporation was in terms utterly inapplicable.

Are, then, the words "at the pleasure of the corporation" mere surplusage? Certainly not, if we can give them a sensible meaning bearing on the intention of the parties. They seem to have an important bearing in this respect, and to express the agreement of the parties that the principal of the stock should not be paid after July 10, 1855, before such time as in its pleasure the corporation should determine. A motive for such agreement on the part of the creditor may be readily conjectured. He may have speculated that the rate of interest would be reduced below five per cent in this state in 1855, as the event was in relation to the banks of England and France. But whatever may have been the motive of the creditor, we must give effect to his stipulation, unless it be unlawful; and this brings us to the second point.

The corporation of Columbia, by its charter and amendments, is perpetual in duration, and possesses the power of contracting such debt as is in controversy by issuing stock. It is conceded that a sovereign power may contract debt redeemable at its pleasure, as in the present case, such as the consols in England and our own revolutionary three per cents; but it is urged

that a subordinate corporation lacks the element of perpetuity, which gives value to such stock, and consequently has no power to contract in the form in controversy. The force of this distinction is not apprehended by us. Probably by general law, and certainly under the act of 1841, the charter of Columbia is liable to modification by the legislature of the state; but *prima facie* the charter is perpetual; and the town may contract, and others may contract with it, on the hypothesis that the charter now perpetual will never be repealed. In fact, some of the sovereign states in Europe and America have been suppressed, but it was never supposed that their liabilities were contemporaneously submerged. It is certainly possible that the charter of Columbia may be repealed; but we have no reason to suspect that it will be repealed in such form as will enable it to defraud its creditors. It is suggested, however, apart from this distinction between sovereign and local corporations, that the condition to pay the principal sum at the pleasure of the debtor is void, because essentially inconsistent with the obligation to pay at some time. Undoubtedly, an inconsistent condition may be void, and the obligation remain single as any condition in violation of the policy of the state declared by its legislation would be; and a condition against alienation or liability for debt in a conveyance in fee would be void by the common law. So, too, if by fraud or mistake the instrument of agreement does not express the intention of the parties, as where one, after acknowledging a debt, says he will never pay it, the instrument may be reformed. But in the present case no fraud, mistake, nor inconsistency is perceived. At the utmost, it is an engagement of the debtor to pay a perpetual annuity, and that is not unlawful. On the construction of the whole instrument, we adjudge that the corporation of Columbia has a discretion as to time to redeem or reimburse the principal of the debt for the water-works.

It is ordered and decreed that the circuit decree be reversed, and the bill be dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., and DUNKIN, chancellor, concurred.

DARGAN, chancellor, absent.

Decree reversed.

CASES AT LAW
IN THE
COURT OF APPEALS AND COURT
OF ERRORS
OF
SOUTH CAROLINA.

CONNOR v. HILLIER.

[11 RICHARDSON'S LAW, 192.]

MEASURE OF DAMAGES FOR CONVERSION OF CERTIFICATE OF BANK SHARES
is the full value of the shares.

TROVER for two certificates of shares of the Bank of Charleston. The only witness examined testified to the demand and refusal, and to the shares being worth at the date of the demand one hundred and twelve dollars each. The jury found a verdict for the plaintiff for twenty-five dollars. The plaintiff appealed, and moved for a new trial.

Buist, for the appellant.

Campbell, *contra*.

By Court, MUNRO, J. Whether the finding of the jury was in reference to the mere value of the paper upon which the certificate was written, or to the estimated value of the shares represented by it, this verdict is so palpably erroneous that it cannot be permitted to stand. So that the question presented is, By what standard should they have been governed in estimating damages for the conversion of such an instrument?

It is a well-established doctrine, that trover lies for the recovery of a chose in action, such as a bill, note, or bond, and that the rule for estimating the damages is the amount which the instrument calls for upon its face: Sedgwick on Damages, 512. In other words, whenever the instrument is an available security for the amount claimed, the party is entitled to recover

the full amount. In reference to the conversion of muniments of title, the rule is thus stated by Mayne in his treatise on damages, p. 210: "In trover for title deeds, the jury may give the full value of the estate to which they belong by way of damages, which, however, are generally reduced to forty shillings, on the deed being given up." In *Parry v. Frame*, 3 Bos. & Pul. 451, which was an action of trover for a lease, the plaintiff recovered the full value of the lease. In *Colwes v. Hawley*, 12 Johns. 484, the action was by the assignee of a bond to make titles against the defendant by whom it had been converted, and it was held that the plaintiff was entitled to recover as damages the value of the land.

Upon principle and authority, then, we are clearly of opinion that the plaintiff was entitled to recover the full value of the bank shares represented by the said certificate, so that a new trial must be granted; and it is so ordered.

WARDLAW, WITHERS, WHITNER, and GLOVER, JJ., concurred.

New trial ordered.

MEASURE OF DAMAGES IN TROVER: See *Harker v. Dement*, 52 Am. Dec. 670; *Pridgin v. Strickland*, 58 Id. 124; *Moody v. Whitney*, 61 Id. 239, and the notes to these cases.

TROVER WILL LIE FOR NOTE, WRIT OF EXECUTION, OR JUDGMENT: *Buck v. Kent*, 21 Am. Dec. 576; *Hudspeth v. Wilson*, Id. 344; *Keeler v. Fassett*, 52 Id. 71; *Platt v. Potts*, 53 Id. 412; *Lowremore v. Berry*, 54 Id. 188; but not for a note after judgment rendered upon it: *Platt v. Potts*, *supra*.

RYAN v. COPES.

[11 RICHARDSON'S LAW, 217.]

ACTION FOR NUISANCE MAY BE MAINTAINED by one exposed to peculiar danger from the chance of the evil, and hurtful consequences thence resulting to him, without ever having endured the actual occurrence of the threatened evil.

JUDGMENT OUGHT NOT TO BE ARRESTED, where the jury purport to find upon certain counts, but their verdict shows that they considered other counts, less questionable, even though the counts upon which the verdict was expressly found were insufficient.

NEW TRIAL WILL BE GRANTED UPON CONTRADICTIONARY VERDICT, it seems, showing that other counts were considered besides those upon which the verdict purports expressly to be found.

NEW TRIAL WILL BE GRANTED if material allegations are not proved.

LICENSE BY CITY TO ERECT STEAM COTTON-PRESS IS NOT CONCLUSIVE that it is not a private nuisance, although the license is entitled, as evidence, to high consideration.

CASE for nuisance. The declaration contained four counts, of which the third and fourth are fully set forth in the opinion. The first alleged that the plaintiff had erected upon a contiguous lot a steam cotton-press, and in consequence of the smoke, soot, dirty water, noise, and vibration thereby occasioned, the plaintiff's habitation had been annoyed. The second count complained of the defendant having caused the erection of a steam-press, to the consequent annoyance of the plaintiff's habitation. The defendant had erected the press under license of the city council of Charleston, in pursuance of an ordinance prescribing regulations for steam-engines in the city. The plaintiff kept a boarding-house, and although some of his boarders had apprehended fire and the bursting of the boiler, and were annoyed by an unpleasant mist, a stunning noise, and a disagreeable vibration, none of them had left the house for any of these causes. There was no evidence that the plaintiff had been troubled with smoke, soot, and vapor, except that steam from an exhaust-pipe was sometimes felt. The plaintiff's rates of insurance had been increased, but his premises were afterwards assessed, for purposes of taxation, at an increased valuation. The jury returned the following verdict: "We find for the plaintiff, on the third and fourth counts, and damages to the amount of four hundred dollars; also recommending that the exhaust-pipe be altered so as not to throw any water on the plaintiff's premises." The defendant appealed, and moved in arrest of judgment, on the ground that the verdict found for the plaintiff upon the third and fourth counts only, and the matter alleged in those counts contained no cause of action, and was insufficient to sustain a judgment in the plaintiff's favor; and failing in this motion, he also moved for a new trial on grounds sufficiently indicated in the opinion.

De Treville, for the appellant.

Hayne and Miles, and Magrath, contra.

By Court, **WARDLAW, J.** The motion in arrest of judgment, assuming that the verdict for the plaintiff has been rendered on the third and fourth counts only, and is in effect a verdict for the defendant on the first and second counts, requires the sufficiency of the third and fourth to be examined.

The third, analyzed more carefully than has been done in the report, will be found to complain that the defendant, in the city of Charleston, wrongfully and injuriously erected buildings on his lot, contiguous to the dwelling-house of the plain-

tiff, and therein wrongfully and injuriously carried on, and still carries on, the business of pressing cotton-bales by machinery worked by steam, and called a steam cotton-press, to which are appurtenant furnaces, boilers, and large fires; and therein kept, and still keeps, large quantities of cotton, an inflammable material, easily ignited and difficult to be extinguished; by which means the dwelling-house of the plaintiff is subjected to increased risk of fire, and thereby rendered insecure, unsafe, uncomfortable, and of less value, and he required to pay higher rates of insurance, and prevented from insuring for so large an amount.

A summary outline of this count is as follows: The wrongful acts of the defendant have increased the risk of fire, and that risk has destroyed the security and comfort of the plaintiff's habitation, depreciated the value of his property, and subjected him to increased expense of insuring.

The fourth count complains in like manner of the wrongful and injurious erection and working of a steam cotton-press, contiguous to the plaintiff's dwelling, with furnaces, boilers, and fires appurtenant; by which means, and by reason of the liability of the said boilers to explode, the dwelling of the plaintiff has been rendered unsafe, incommodious, and unfit for habitation, the lives of himself and family jeopardized, and he in the enjoyment of his dwelling annoyed and damnified.

Here the erection and working of the press, and of boilers liable to explode, constituted the injury; the danger to the dwelling and its inmates is the intermediate result, and the destruction of the comfort of the habitation thereby produced is the damage.

In considering this motion in arrest of judgment, we must keep to the counts in question, and can know nothing of the action of council or any other matter in the evidence. "Wrongfully and injuriously" preclude all legal cause of excuse. We must, by intendment, in support of the verdict, presuppose the perfect allegation and satisfactory proof of all facts which are defectively stated, and of all that are plainly inferable from what is stated. In a general allegation of wrongful conduct, followed by alleged damage, we must disregard the omission of intermediate particulars, by which effect was given to the conduct: *Winsmore v. Greenbank*, Willes, 583. We may in this way be led to say, in reference to the third count, that by proximity of the large quantities of cotton to the large fires the risk was increased; and in reference to the fourth, that the

boilers were more than ordinarily liable to explode, to occasion the danger and consequences alleged. Risk of harm by fire in one count and risk of harm by explosion in the other are the immediate consequences laid, from which loss is alleged to have ensued; and upon either count the question comes at last, whether a plaintiff, without ever having endured the actual occurrence of a threatened evil, may found an action upon the danger to which he has been exposed from the chance of the evil, and the hurtful consequences thence resulting to him. I do not put the question, whether danger will suffice without actual loss; for in this case actual loss—a dwelling made unfit for habitation and the value of property depreciated—is alleged as the proximate and natural consequences of the danger wrongfully produced.

In 1752 Lord Hardwicke, upon a motion made by private individuals (*Anonymous*, 3 Atk. 750), after considering the circumstances of the case, refused to grant an injunction to stay the building of a house intended as a house in which to inoculate for the small-pox. He held that if the house should be a nuisance it would be a public one, and that the proper method of proceeding would have been by information in the name of the attorney-general; that bills to restrain nuisances must extend to such only as are nuisances at law, and it had not been settled that a house for the reception of inoculated patients was a nuisance; on the contrary, upon an indictment of that kind there had then lately been an acquittal. He remarked that “the fears of mankind, though they may be reasonable ones, will not create a nuisance,” and that “it is in the nature of terror to diffuse itself in a very extensive manner.” These remarks only are important now—the point adjudged resting upon circumstances and observations outside of them.

Fears may be reasonable, yet be in truth groundless. They denote the impressions made upon the mind by appearances, and those, even when well suited to mislead the judicious, sometimes vary widely from the reality. Actual danger differs from both the fear of an evil and the evil that is feared. It may exist, and those exposed to it be unconscious of its existence. When it has been perceived, the loss occasioned by it is more substantial than a painful emotion of the mind.

Fifteen years after Lord Hardwicke’s refusal of an injunction to prevent the establishment of a house for inoculation, so little were such houses dreaded, when they were well kept, that upon the indictment for keeping one the court, although it would not quash upon motion, directed a demurrer: *Rex v.*

Sutton, 4 Burr. 2116. Later cases, even after the use of vaccination was generally introduced, have sustained indictments for the public exposure of a small-pox patient, upon principles which extend to all contagious disorders and illustrate the distinction between danger and fear: *Rex v. Vantandillo*, 4 Mau. & Sel. 73; *Rex v. Burnett*, Id. 272.

In *People v. Sands*, 1 Johns. 78 [3 Am. Dec. 296], an indictment for keeping near a public street a house with a large quantity of gunpowder in it, to the danger of inhabitants and passers, and to the common nuisance of all the community, was held insufficient because there was no statement of carelessness or unsuitableness in either the house or the keeper, nor any other allegation of special circumstance in time, place, or manner showing the danger, and nothing could be intended in aid of an indictment. Yet all the judges who so held were of opinion that if by proper allegations the danger had been exhibited, the indictment would have been found. Kent and Livingston, two of these judges, although the former adverts to the general disrepute in which 12 Modern is held, both notice and approve what is attributed to Lord Holt (*Anonymous*, 12 Mod. 342), where he is said to have held, upon an indictment for keeping powder, that to support the charge there must be apparent danger or mischief already done. "Apparent," if it was used by Lord Holt, must have been here used in its sense of plain—indubitable, not in that of seeming—not real.

The cases which have been mentioned all related to public nuisances. The one before us is an action on the case for an injury, which, whether called a private nuisance or not, is alleged to have occasioned actual loss by depreciation of property and annoyance of habitation; and the question resolves itself into this, whether this loss is made no legal damage by the circumstance that it has come through the intervention of danger produced, and not of evil actually endured. If common danger may constitute a public nuisance, why should not peculiar danger maintain an action for the special loss it has occasioned? Any tainting of the atmosphere, any offense to the sense of smelling, any immission of disagreeable substances, however subtle, perceived by the senses, may give cause of action; a deleterious substance, not perceptible to the senses, as miasma from decaying vegetables, or mercury in a gaseous form, differs only in evidence. If its actual existence and penetration of a house, and its dangerous nature, can be established, it will appear to affect the health and annoy the

habitation, in kind if not in degree, the same as gas from coke-works, or from a manufactory of sulphuric acid, would do. Upon this motion in arrest of judgment, the reality of the danger and the harm it has done must be taken as proved. In questions before a jury, fears would be disregarded until sufficient grounds for them had been shown, and in all cases a high degree of probability that the evil dreaded would actually occur would be required to constitute actual danger; although of extreme ills less chance might be expected to be endured than of ills whose probable consequences would not be so disastrous. Real danger of great ill no prudent man would abide, and therefore it may be legally considered to produce the losses which the fears of it, and the efforts to avoid it, occasion. Between it and the hazard, which may excite fear, but which the constant man becomes habituated to forget, there is a difference similar to that which the law recognizes between an assault and an insulting gesture; and between the real danger and the evil already happened, not more difference than between an assault and a battery.

It is not to be conceived that one might build a powder-mill near to the habitation of another without giving cause of action before an explosion; nor that one might, without incurring responsibility in a private action before he had caused the burning of his neighbor's house, keep in an open space near to that house a great fire in the midst of barrels of turpentine. It is true that every one must be allowed reasonably to use his own, although some annoyance may thereby be occasioned to another; and it is true that some increase of the risk of fire is brought upon a house by any other wooden house placed near it, more especially if some dangerous trade is carried on in the said house, or its occupant is a careless person; and for such increase of risk a plaintiff should not obtain a verdict. But if in such a case an action should be brought, and upon the allegation of wrongful erection by the defendant, and of danger thence produced from which damage had resulted, a verdict for the plaintiff should be found, a motion in arrest of judgment would meet with difficulties which neither a demurrer nor a defense on the merits could have encountered.

The determination of the court to refuse the motion in arrest of judgment has been somewhat fortified by the manifest reference to the first and second counts, which the jury have made by their recommendation concerning the exhaust-pipes. It is not altogether clear that the ejections from the pipe, which are not at all mentioned in the third and fourth counts, did not

enter into the assessment of damages, although the jury say that they find for the plaintiff on these counts. If, in truth, other counts less questionable were considered in the assessment, the judgment ought not to be arrested even if the counts said to be found for the plaintiff were insufficient, especially as there is no express finding of the other counts for the defendant.

Coming, then, to the motion for a new trial, we might rest the grant of it solely upon the contradictory nature of the verdict, which has been pointed out in the report. In a matter of so much importance, it should not be uncertain what the jury meant. As the grounds of appeal do not, however, allude to the form of the verdict, we look beyond this. We do not find in the evidence any proof as to some of the facts which, in our consideration of the former motion, were taken as proved.

Neither dangerous proximity of the cotton to the fire, nor any special liability of the boilers to explode, is in the testimony of any witness. The danger either of fire or of explosion does not appear to have lessened the number of inmates in the plaintiff's house, nor to have brought its price much below the double of the city assessment. There is no evidence concerning smoke, soot, and vapor. These might possibly have been prevented in the working of the defendant's machinery; whether they would have been or not, the plaintiff was not bound to endure them, if they exceeded those unavoidable annoyances which in a crowded part of a city every one must suffer from his neighbors' use of their own. These, if so excessive, and if not necessarily incident to a steam cotton-press, have not been licensed by the city council; if so incident, could not have been licensed unreasonably to annoy the plaintiff, for in that case they constituted in themselves violations of his absolute right, which the council could not legalize.

The steam-engine is not of itself a nuisance. So common and valuable has it become, that public policy suggests caution in doing what may interrupt its use. But in reference to an engine itself, and to any useful machinery propelled by it, there is justice in holding that one set of citizens should not be burdened or annoyed for the benefit of others.

In view of the different conclusions about nuisance reached by the law according to differences of place, of modes of proceeding, and of other circumstances, it is wise that every business, where necessary incidents are likely to annoy the neighborhood in which it is conducted, should be subject to such regulations as may make it comparatively harmless. And in

the city of Charleston, where rulers are elected by those over whom they exercise authority, and are intrusted with large powers by the legislature, it would have been strange if steam-engines had not attracted the notice of council. The ordinance concerning them, which the defendant has adduced in his behalf, is one which the court would most unwillingly restrain. Under it and the action of the council, he may well say that his cotton-press had been licensed, and that its continued existence affords evidence of its continued approval. But every license, express or implied, may be abused, and the license does not sanction the abuse; as, for instance, license to retail spirituous liquors is no bar to an indictment for keeping a disorderly house. Actual damage done to the plaintiff, and not excused under the circumstances by the law, cannot be justified by the license of the council; but in considering whether his neighborhood was a fit one for a cotton-press, whether he has been unreasonably endangered, and whether the annoyances from the defendant's business arise to such degree as to constitute a private nuisance (which are in some measure questions of opinion), the action of the council is, as evidence, entitled to higher estimation than the opinions of private individuals. The mayor and aldermen are the representatives of the city, and a citizen who has made an investment under their authority, after consulting them in a matter intrusted to their judgment, should not be readily found guilty of doing wrong by creating danger which they do not apprehend, or producing annoyances which they do not perceive.

The motion for a new trial is granted.

WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

New trial ordered.

INJUNCTIONS AGAINST THREATENED NUISANCES.—It is a well-settled doctrine that a court of equity has jurisdiction to restrain the erection of a building, or other structure, or the carrying on of a business, because it threatens an injury to an adjoining proprietor, where the court is satisfied that the act complained of will inevitably result in a nuisance: 3 Pomeroy's Eq. Jur., secs. 1349, 1350; Kerr on Injunctions, 339; Wood on Nuisance, sec. 796; *Dawson v. Paver*, 5 Hare, 415, 430; *Potts v. Levy*, 2 Drew. 272; *Elwell v. Crouther*, 31 Beav. 163; *Attorney-General v. Sheffield Gas Consumers' Co.*, 3 DeG. M. & G. 304; *State v. Mayor etc. of Mobile*, 5 Port. 279; S. C., 30 Am. Dec. 564; *Coker v. Birge*, 9 Ga. 425; S. C., 54 Am. Dec. 347; *De Gise v. Seltzer*, 64 Ga. 423; *People v. City of St. Louis*, 5 Gilm. 351; S. C., 48 Am. Dec. 339; *Dunning v. City of Aurora*, 40 Ill. 481, 486; *Wahle v. Reinbach*, 76 Id. 322; *Fuselier v. Spalding*, 2 La. Ann. 773; *Blanc v. Murray*, 36 Id. 162; S. C., 51 Am. Rep. 7; *Hamilton v. Whitridge*, 11 Md. 123; S. C., 69 Am.

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Dec. 184; *Whitfield v. Rogers*, 26 Miss. 84; S. C., 59 Am. Dec. 244; *Society etc. v. Morris Canal etc. Co.*, 1 N. J. Eq. 157; S. C., 21 Am. Dec. 41; *Robeson v. Pittenger*, 2 N. J. Eq. 57; S. C., 32 Am. Dec. 412; *Ross v. Butler*, 19 N. J. Eq. 294; *Gardner v. Newburgh*, 2 Johns. Ch. 161; S. C., 7 Am. Dec. 526; *Belknap v. Belknap*, 2 Johns. Ch. 463; S. C., 7 Am. Dec. 548; *Catlin v. Valentine*, 9 Paige, 575; S. C., 38 Am. Dec. 567; *Attorney-General ex rel. Bell v. Blount*, 4 Hawks, 384; S. C., 15 Am. Dec. 526; *Clark v. Lawrence*, 6 Jones Eq. 83; *Wier's Appeal*, 74 Pa. St. 230; *Aldrich v. Howard*, 7 R. L. 87; *Philippe v. Socket*, 1 Tenn. 200; *Coalter v. Hunter*, 4 Rand. 58; S. C., 15 Am. Dec. 726; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Walker v. Shepardon*, 2 Win. 384; S. C., 60 Am. Dec. 423. Indeed, the reason is as cogent, and in some respects more so, why the creation of an unquestionable nuisance should be prevented, as that an existing one should be abated. But the threatened injury must be real, and not trifling or temporary. It must be one in which the legal remedy of damages is inadequate, either because of its essentially irreparable character, or because of its repetition and continuance. And the title of the complainant must not be subject to any substantial doubt or question. Thus far the rules obtain alike to present and to threatened nuisances. But the court should obviously proceed with much caution in restraining threatened injuries, since the remedy is a severe one. If, therefore, the act complained of is not a nuisance *per se*, but may or may not become a nuisance according to circumstances, and it is uncertain or contingent that it will operate injuriously, equity will not interfere until the question is settled at law, or by an issue directed by the court. These propositions are established by numerous authorities: 3 Pomeroy's Eq. Jur., sec. 1350; 1 High on Injunctions, sec. 742; Kerr on Injunctions, 340; *Earl of Ripon v. Hobart*, 3 Myl. & K. 169; S. C., Cooper's Cas. temp. Brough. 333; *Haines v. Taylor*, 2 Phil. 209; *Rosser v. Randolph*, 7 Port. 238; S. C., 31 Am. Dec. 712; *St. James's Church v. Arrington*, 36 Ala. 546; *Kingsbury v. Flowers*, 65 Id. 479; S. C., 39 Am. Rep. 14; *Rouse v. Martin*, 75 Ala. 510; S. C., 51 Am. Rep. 463; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; S. C., 36 Am. Dec. 502; *Thebaud v. Canova*, 11 Fla. 143; *Harrison v. Brooks*, 20 Ga. 537; *Whitaker v. Hudson*, 65 Id. 43; *Rounsaville v. Kohlheim*, 68 Id. 668; S. C., 45 Am. Rep. 505; *Town of Lake View v. Letz*, 44 Ill. 81; *Laughlin v. President etc. of Lamasco*, 6 Ind. 223; *Keiser v. Lovett*, 85 Id. 240; S. C., 44 Am. Rep. 10; *Shiras v. Olinger*, 50 Iowa, 571; S. C., 32 Am. Rep. 138; *Adams v. Michael*, 38 Md. 123; S. C., 17 Am. Rep. 516; *Dumesnil v. Dupont*, 18 B. Mon. 800; S. C., 68 Am. Rep. 750; *Rogers v. Danforth*, 9 N. J. Eq. 289; *Butler v. Rogers*, Id. 487; *Wolcott v. Melick*, 11 Id. 204; S. C., 66 Am. Dec. 790; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Attorney-General v. Steward*, Id. 415; *Duncan v. Hayes*, 22 Id. 25; *Mohawk Bridge Co. v. Utica etc. R. R.*, 6 Paige, 554; *Hudson etc. Canal Co. v. New York etc. R. R.*, 9 Id. 323; *Phanix v. Commissioners of Emigration*, 1 Abb. Pr. 466; *Barnes v. Calhoun*, 2 Ired. Eq. 199; *Simpson v. Justice*, 8 Id. 115; *Clark v. Lawrence*, 6 Jones Eq. 83; *Frisbie v. Patrick*, Id. 354; *Dorsey v. Allen*, 85 N. C. 358; S. C., 39 Am. Rep. 704; *Biddle v. Ash*, 2 Ashm. 211; *Hough v. Doylestown Borough*, 4 Brews. 333; *Sellers v. Pennsylvania R. R.*, 10 Phila. 319; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Dilworth's Appeal*, 91 Id. 247; *Lining v. Geddes*, 1 McCord Ch. 304; S. C., 16 Am. Dec. 606; *Kirkman v. Handy*, 11 Humph. 406; S. C., 54 Am. Dec. 45; *Ramey v. Riddle*, 1 Cranch C. C. 399; *Flinn v. Russell*, 5 Dill. 151.

Certain American cases hold, as in existing nuisances, that the court will be less inclined to interfere where the apprehended injury is to follow from such establishments as have a tendency to promote public convenience:

Harrison v. Brooks, 20 Ga. 537; *Attorney-General ex rel. Eason v. Perkins*, 2 Dev. Eq. 38; *Barnes v. Calhoun*, 2 Ired. Eq. 199; *Attorney-General ex rel. Bradsher v. Lea's Heirs*, 3 Id. 302; *Wilder v. Strickland*, 2 Jones Eq. 386; *Dorsey v. Allen*, 85 N. C. 358; S. C., 39 Am. Rep. 704. So "an injunction ought not to be granted where the benefit secured by it to one party is but of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences:" *Morris etc. R. R. v. Prudden*, 20 N. J. Eq. 530.

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There is no dissent from the above rules. The conflict arises in their application. But much of the difficulty can be cleared up when it is borne in mind the manner in which the applications for injunctions are made and heard in different cases, and that what would be a nuisance in one case would not be in another. As illustrations of the doctrine that a court of equity will not interfere where the erection or business is not a nuisance *per se*, and it is doubtful or contingent whether it will become one, the erection or carrying on of mills or manufactories will not be restrained because of threatened injury from fire or explosion: *Walcott v. Melick*, 11 N. J. Eq. 204; S. C., 66 Am. Dec. 790; *Thebaut v. Canova*, 11 Fla. 143; *Rouse v. Martin*, 75 Ala. 510; S. C., 51 Am. Rep. 463; *Dorsey v. Allen*, 85 N. C. 358; S. C., 39 Am. Rep. 704; nor of blacksmiths' shops: *Butler v. Rogers*, 9 N. J. Eq. 487; *Whitaker v. Hudson*, 65 Ga. 43; nor even a powder-magazine: *Dumesnil v. Dupont*, 18 B. Mon. 800; S. C., 68 Am. Dec. 750; nor because of threatened injury to health and comfort, as gas-works: *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; slaughter-houses: *Attorney-General v. Steward*, Id. 415; *Sellers v. Pennsylvania Railroad*, 10 Phila. 319; but see *Catlin v. Valentine*, 9 Paige, 575; S. C., 38 Am. Dec. 567; cemeteries: *Town of Lake View v. Letz*, 44 Ill. 81; or stables: *St. James's Church v. Arrington*, 36 Ala. 546; *Rounsaville v. Kohlheim*, 68 Ga. 668; S. C., 45 Am. Rep. 505; *Keiser v. Lovett*, 85 Ind. 240; S. C., 44 Am. Rep. 10; *Shiras v. Olinger*, 50 Iowa, 571; S. C., 32 Am. Rep. 138; *Flint v. Russell*, 5 Dill. 151; but see *Coker v. Birge*, 9 Ga. 425; S. C., 54 Am. Dec. 347; but on the other hand, the erection of privies will be prevented: *De Give v. Seltzer*, 64 Ga. 423; *Wahle v. Reinbach*, 76 Ill. 322; or the establishment of a house of prostitution: *Hamilton v. Whitridge*, 11 Md. 128; S. C., 69 Am. Dec. 184.

WINDHAM v. RHAME.

[11 RICHARDSON'S LAW, 288.]

PUNITIVE DAMAGES MAY BE AWARDED IN CASE FOR OBSTRUCTING PUBLIC WAY if the act be willful or the intent malicious.

CASE for special damage done to the plaintiff by the defendant's obstruction of a public way over his land to a public landing. The plaintiff had hauled fifty cords of wood to an old field near the landing, had taken two loads therefrom over the way to the landing, and was proceeding with the third load, when he found that the defendant had obstructed the way by a fence, and forbade the plaintiff's passing. The plaintiff then threw his load of wood by the roadside. The defendant afterwards sold the wood deposited at the landing, saying that it belonged to him, as he forbade the plaintiff from hauling to the landing. The remainder of the fifty cords of wood lay in the field, and had much deteriorated in value. The jury were instructed, as appears in the opinion, that punitive damages might be awarded. The plaintiff had a verdict for five hundred

dollars, and the defendant appealed, and moved for a new trial on the ground of error in the charge.

Pressley, for the appellant.

Hayne, *contra*.

By Court, GLOVER, J. The special injury alleged by the plaintiff consists of the loss and deterioration in value of several cords of wood, caused by the defendant's unlawful act in obstructing a public road. It is conceded that whoever sustains a particular injury from a public wrong, beyond that suffered by the rest of the community, may maintain an action; consequently the motion for a nonsuit was abandoned at the hearing, and the argument was confined to the motion for a new trial on the ground of error in the charge. The jury were instructed "that in actions on the case, punitive damages might be found, in the sound discretion of the jury, if evil motive or unworthy conduct, deserving punishment, had been established against the defendant."

The form of action furnishes no certain rule by which damages may be measured. In actions of contract, the motive of the defendant is not generally an element which enters into the estimate of damages; but in actions of tort, a large discretion is allowed to the jury, if the act be willful or the intent malicious. The general rule adopted in injuries to person, character, or property, whether the action be trespass or case, is that all the attending circumstances showing a malicious motive may be given in evidence, and damages may be awarded, not only to recompense the plaintiff, but to punish the defendant. In actions on the case, where the act complained of was the result of negligence, exemplary damages are allowed, as where injury arose from the defect of a bridge which the defendants were bound to repair: *Whipple v. Walpole*, 10 N. H. 130. If personal property is maliciously injured or destroyed, in an action of trespass the extent of relief is not limited to the actual loss; and in one case for beating a horse to death, where smart-money was given, the court said: "We should have been better satisfied with the verdict if the amount of the damages had been greater and more exemplary:" *Wort v. Jenkins*, 14 Johns. 56.

Whether the relief is sought in trespass or case for injury to personal property, all the surrounding circumstances that give color to the act, and explain the motive, are admissible in evidence to ascertain if the act be the result of accident or negligence, or of deliberate and evil purpose, and if from malfeasance,

an amount beyond the pecuniary loss should be given, by way of punishment. In cases of tort to the person or character, damages must depend, in a great measure, upon the motive and degree of aggravation, and "the verdict is generally a resultant of the opposing forces of the counsel on either side, tempered by such moderating remarks as the judge may think the occasion requires:" Mayne on Damages, 12.

The injury to the plaintiff's property was caused by the deliberate act of the defendant in obstructing a public way, and by the conversion, subsequently, to his own use of so much of the wood as he had inclosed by his fence on the public landing. From the attendant circumstances, his wanton conduct may be reasonably inferred; and if the plaintiff had endeavored either to repossess himself of his property, or to assert his right to the use of the way by abating the nuisance, otherwise than by due course of law, the consequences, probably, would have been a breach of the peace. Had the defendant acted on a mistaken opinion of his right to the land, it would have weakened the presumption of a malicious purpose; but he both knew and had assented to the public right.

Where a nuisance is not abated after one verdict, the jury may give punitive damages in a second action brought for the continuance of the nuisance, upon the ground that, from his failure to abate it after verdict, it is presumed that the defendant's original act was willful, and from which an intention to continue the nuisance is inferred. If, from the circumstances that give character to his act, his motive can be ascertained in the first action, the plaintiff is entitled to such enhanced damages as will afford complete redress by a prompt abatement of the nuisance.

The plaintiff has set out his special damage, and we are of opinion that the evidence was properly admitted to show the defendant's motive, and that the jury was not limited to the actual pecuniary loss. There was evidence from which the defendant's wanton purpose may be inferred, and the amount of the verdict does not appear to exceed the bounds of wholesome example.

The authority of *Hamilton v. Feemster*, 4 Rich. L. 573, may be relied upon in support of this opinion. That was an action on the case, and the charge was, "that if the evidence satisfied the jury that Feemster had taken up and caused to be committed to jail, as a runaway, the plaintiff's negro, knowing he was not a runaway, and had done this act malevolently, with a view to harass, vex, and insult the plaintiff, they might give

an amount of damages beyond that specially set forth in the declaration." The damages were punitive, and the charge was approved.

Motion dismissed.

WARDLAW, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

PUNITIVE DAMAGES MAY BE AWARDED FOR MALICIOUSLY OBSTRUCTING HIGHWAY: *Linsley v. Bushnell*, 38 Am. Dec. 79, 82; note to *Austin v. Wilson*, 60 Id. 768; and see note to *Merrills v. Tariff Mfg. Co.*, 27 Id. 684; *McCoy v. Danley*, 57 Id. 680; note to *Ross v. Moses*, 67 Id. 562, 566.

MCALLISTER v. TATE.

[11 RICHARDSON'S LAW, 509.]

TESTATOR'S MEANING OF AMBIGUOUS WORDS IN WILL CANNOT BE SHOWN by the testimony of the one who drew the will.

DEVISE TO ONE "IN FEE-SIMPLE FOR LIFE" PASSES ESTATE IN FEE.

TRESPASS to try title. The plaintiff claimed in his own right, as an heir of one Nathan McAllister, sen., deceased, and also as purchaser from other heirs; while the defendant held under a conveyance from one Nathan McAllister Arnold, who claimed under the will of Nathan McAllister, sen., by virtue of the following clause: "I give and bequeath to Nathan McAllister Arnold, a child raised by me, a certain tract of land, whereon David Gordon now lives, containing two hundred and ninety-three acres, more or less, in fee-simple for life." The defendant sought to show by one Dr. Evins, who drew the will, what the testator meant by the words "fee-simple for life," but the court excluded the testimony, and instructed the jury that the devisee Arnold took but an estate for life. The defendant appealed, and moved for a new trial, on the grounds that the testimony of Evins was improperly excluded, and that the court erred in instructing the jury that Arnold took only a life estate. The law court of appeals, after hearing argument, ordered the case to the court of errors.

Perry and McGowan, for the appellant.

Sullivan and Reed, contra.

By Court, O'NEALL, J. On the first ground of appeal the court of law entertained no doubt. The will is to be construed by the words used. The writer, Dr. Evins, was an incompetent witness to say what was meant by the words "in fee-sim-

ple for life." To solve that question, the case was ordered to the court of errors.

There is no doubt about the general rule that in construing a will the intention, when it can be ascertained, unless it be contrary to some rule of law, is to prevail. So, too, it is permissible, in construing a will, to read all its parts, and to gather light from any part which may reflect it upon that which is dark and uncertain. The will here shows that the testator intended to dispose of his whole estate; there is no residuary clause in the will. Each devise, therefore, it may be well argued, was intended to carry all the estate which the testator possessed in the land devised.

That neither the testator nor his scribe knew the precise meaning of the term "in fee-simple," is, I think, true. For when he gave to Nathan McAllister another tract of land, he used the words "in fee-simple forever." When, if either had understood the meaning of the word "fee-simple," he would have known that those words carried an estate to "a man and his heirs forever;" and that the word "forever," after the word "fee-simple," was tautology.

To construe the words "in fee-simple for life" as conveying an estate in fee is, I think, the construction best in support of the testator's intention. For it subserves and carries out his expressed purpose of disposing of his whole estate. But if they must be read by themselves, then they are utterly inconsistent, and both must be rejected; or the words "for life" must be regarded as absurd, and be altogether struck out of the will. Either course will sustain the defendant's title. If both are struck out as unmeaning when used together, then the will would be read as simply devising to Nathan McAllister Arnold. Such a devise by our act of 1824, "for the amendment of the law in divers particulars therein mentioned" (Act of 1824, sec. 1, 6 Stats. 237), would carry an estate in fee-simple. The words of the first section are: "That no words of limitation shall hereafter be necessary to convey an estate in fee-simple by devise; but every gift of land by devise shall be considered as a gift in fee-simple, unless such a construction be inconsistent with the will of the testator, express or implied." Who can say that there is anything in the will inconsistent with the construction that the devise is in fee-simple.

But if the words "in fee-simple for life" must remain, then I think that the rule that the words "for life" should be regarded as repugnant to the estate already conferred, and should be rejected, must prevail. For it is impossible to give

a consistent meaning to the words "in fee-simple" and the words "for life." The words "in fee-simple" carry the estate to the devisee and his heirs forever. The words "for life" added to these would present the strange anomaly of an estate to a man and his heirs forever for life. This would be too absurd to be tolerated, and yet that is precisely the legal effect of using all the words contained in the devise.

The case of *Doe ex dem. Cotton v. Stenlake*, 12 East, 515, it seems to me, favors the view which I have just taken. The devise there was, "I give unto my daughter, Phillis Cotton, and her heirs, Moorhead meadow, during their lives." Lord Ellenborough, C. J., said: "The words 'during their lives,' after the devise to the daughter and her heirs, are merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit should enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they could in fact only enjoy the benefit of it for their lives." In this case the devise is in legal effect to Nathan McAllister Arnold and his heirs, to which the testator added "for life." That, as in *Doe ex dem. Cotton v. Stenlake*, *supra*, might mean to describe the enjoyment of the devise by him and his heirs each in turn for life.

Without pursuing further the words so senselessly used, we are satisfied to declare that Nathan McAllister Arnold took an estate in fee.

The motion for new trial is granted.

DUNKIN, DARGAN, and WARDLAW, chancellors, and GLOVER, J., concurred.

WARDLAW and MUNRO, JJ., dissented.

JOHNSTON, chancellor, and WITHERS, J., absent.

WHITNER, J., gave no opinion, having been consulted when at the bar.

Motion granted.

EXTRINSIC EVIDENCE IS INADMISSIBLE TO SHOW TESTATOR'S MEANING OF WORDS: *Yundt's Appeal*, 53 Am. Dec. 496; and see as to the admissibility, in general, of extrinsic evidence in the construction of wills, *Gifford v. Dyer*, 57 Id. 708; *Yates v. Cole*, 59 Id. 602, and the notes thereto; as to the admissibility of the testimony of the one who drew the will, see particularly *Rothmaler v. Myers*, 6 Id. 613.

FEE, WHEN PASSES BY WILL: See *Bell v. Scammon*, 41 Am. Dec. 706; *Seard v. Horton*, 43 Id. 659; *Rubey v. Barnett*, 49 Id. 112; *Schriever v. Meyer*, 57 Id. 634; and see the principal case cited and commented upon in *Moody v. Todder*, 16 S. C. 564; *Ex parte Yown*, 17 Id. 536.

MOORE v. SMITH.

[11 RICHARDSON'S LAW, 509.]

ADMINISTRATION OF ESTATE OF LIVING PERSON IS WITHOUT JURISDICTION AND VOID; whether granted on direct evidence of death, or on the presumption arising from the fact of absence unheard of for seven years; and no one claiming under the administration can be protected.

TROVER for a negro woman. In the spring of 1845, the plaintiff removed his residence in South Carolina, leaving behind him considerable property, including the negro in question, in charge of an agent. In December, 1852, the plaintiff not having been heard of since his departure, letters of administration were granted on his estate under the presumption that he was dead. The defendant purchased the negro in July, 1853, from a distributee of the estate. In June, 1857, the plaintiff unexpectedly returned and commenced this action. The jury returned a verdict for the plaintiff for the value of the slave and her hire, under the instructions of the court that the administration was void for want of jurisdiction. The defendant appealed and moved for a new trial.

Wilson and Melton, for the appellant.

G. W. Williams, contra.

By Court, **WARDLAW, J.** Many *dicta* may be found to sustain the proposition that administration granted of the goods of a living person is entirely void: 1 *Williamson Executors*, 461; *Appeal of Peebles*, 15 Serg. & R. 42; *Moore v. Tanner's Adm'r*, 5 T. B. Mon. 46; but all of these rest upon a *dictum* of Buller, J., in *Allen v. Dundas*, 3 T. R. 129, and that, so far as I can find, upon general principles and the unquestioned opinion prevailing in both the civil and the ecclesiastical courts of England. It is rather strange that with the general application which has been made of the presumption of death from absence unheard of for seven years, and especially in this land of migration, some case does not appear in the reports where a person who had been presumed to be dead reappeared to supersede his administrator. A case which I think is similar in principle may be seen in *In re Napier*, 1 Phillim. 83. There, Charles James Napier, esq., having in the peninsular war of 1808 been left for dead on the field of battle, and been reported amongst the slain in the dispatches of Sir John Hope, his will was admitted to probate on the affidavit of his brother; upon his return to England the probate was revoked as granted in error, and was declared to be null and

void to all intents and purposes whatsoever in the law, and the original will with the canceled probate was delivered to him.

The defendant in the case now before us distinguishes this case from that of Napier's in three particulars, which he deems important: 1. The action of the ordinary there was not based, as here it was, on the presumption of death—the legal presumption, as the defendant calls it; 2. There no right of an innocent purchaser intervened, as here it does; 3. There the probate was revoked, but here the grant of administration is yet subsisting.

1. The presumption may be of great antiquity and of frequent use, but still it is only a presumption of fact, to which artificial force has been given beyond its natural effect upon belief. There are not, in reference to this subject, two kinds of death, as has been said at the bar, actual and presumptive, but two kinds of evidence, direct and circumstantial, which may be given of death. Upon whichever of the kinds of evidence the ordinary acts, the fact of actual death is, by his grant of probate or of letters of administration, assumed to have been proved. When the assumption was founded on direct evidence, it seems to be conceded that undeniable disproof of it annuls the act of the ordinary; for no one has ventured to maintain that a person should be deprived of any right because in his temporary absence a witness, willfully or through mistake, gave on oath a false account of his death, and thereupon there was speedy administration of his goods. The difference, if any, would not be in favor of this defendant, where the ordinary should act, not on the direct testimony of witnesses, but upon inferences drawn from such circumstances, shown by testimony, as these: The person whose death was to be established went to sea in a storm, fragments of the vessel he went in were found, and he was not heard of for six months afterwards. And it is only adopting evidence of death, which, however truthful in the ordinary course of human affairs, is really less likely than the circumstances just mentioned to produce belief, when the ordinary acts upon the presumption that arises from absence for seven years unheard of. Many administrations have been granted on the presumption. Courts have made distribution in conformity with it; and it is urged that if the ordinary had refused to act on it he would have been compelled by a higher tribunal to do so. This may be admitted, for by *mandamus* or order made upon appeal the ordinary would be compelled in any case to act according to a just judgment of the evidence presented to him whether direct

or presumptive. But his action, when performed under compulsion, would have no greater validity than if it had been the voluntary result of his own judgment. If, in the latter case, it would fall upon removal of the fact which constituted its foundation, so it would do in the former one.

2. This defendant is really a purchaser, not from the administrator, but from one who, without other consideration than his claims as next of kin, was permitted to succeed to the plaintiff's rights; and in no case does the plea of purchaser for valuable consideration without notice of itself avail at law, or even in equity, against a legal title. But in the most advantageous position which under this head the defendant could occupy, his resistance of the plaintiff's title would be ineffectual. It is true that in some instances of void probates or void grants of administration a distinction is made between the wrongful executor or administrator and his innocent alienee, in favor of the latter: 1 Williams on Executors, 490; *Graybrook v. Fox*, Plowd. 276; but this favor to the alienee is shown only where the act of alienation was done in due course of administration; and in reference to such act the wrongful executor or administrator and the alienee are put on the same footing as when alienation has been made by a more common executor *de son tort*: 1 Williams on Executors, 223; *Coulter's Case*, 5 Co. 30 b; *Parker v. Kett*, 1 Ld. Raym. 661. Of the goods of a living person there can, however, be no due course of administration; in their alienation, as if the owner were dead, there can be no executor *de son tort*—no wrongful administrator—nothing but unauthorized interference—at the very least misconception of fact inducing misapplication of terms—when the truth appears solecism and absurdity, resulting in tortious violation of right, if the error be not corrected.

The purchaser relied on a grant made by a court of competent authority, and it is said that such grant is itself a conclusive confirmation of the presumption upon which it was made. It is plain, as was decided in the case of *Newman v. Jenkins*, 10 Pick. 515, which has been cited for the defendant, that a debtor sued by the supposed administrator in the absence of the plaintiff would not have been permitted, under the plea of the general issue, to urge circumstances for the purpose of showing that the supposed intestate was alive, and the administration therefore void. But can it be said that the presumption of the death of the plaintiff, who is now standing in court, has been conclusively confirmed? Answering no, the defendant insists that upon the presumption sanctioned by law, and the

honest belief thereby induced, judicial action was had, and in faith of that his purchase made.

The unlucky predicament of the purchaser is the same that every one falls into who relies upon the action of a public functionary in a matter not within his sphere. The mistake has been in supposing that there was any judicial action. The whole proceeding was *coram non judice*; for the ordinary had no more power to grant administration of the goods of a living person than a sheriff would have to usurp the ordinary's jurisdiction over the goods of a deceased person. In granting probate of a forged will, or of a former will when the last one should prevail, or in granting letters to one in derogation of the rights of another, the ordinary may err, but still he acts within his jurisdiction, and his grant is effective until it be revoked. The death of the person whose goods are in contest is, however, an essential preliminary to the ordinary's action. Upon the fact of death, which is necessary to give jurisdiction, the ordinary must exercise his judgment, and so must all who claim under the ordinary's assumption of the fact; for the fact not existing, all that depended on it fails.

It has been argued that every inferior court must necessarily judge of the facts essential to its own jurisdiction, and that its judgment in favor of its jurisdiction is not liable to be elsewhere annulled by disproof of any such fact, the want of which does not appear on the face of its proceedings, although its proceedings might sometimes be restrained by prohibition. Reference has been made to our case of *State v. Ben Scott*, 1 Bailey L. 294. Before extreme conclusions should be drawn from that case, a careful consideration should be bestowed upon the cases of *Mendyke v. Stint*, 2 Mod. 271, and *Herbert v. Cook*, Willes, 36, note. But for present purposes, it is enough to observe that Scott's case related to jurisdiction over the person, and to the effect of pleading to the jurisdiction and submitting to an overruling of the plea. In reference to the ordinary's power over the goods of this living plaintiff, the want of jurisdiction respected the subject-matter, not the person. No plea, nor waiver, nor submission of the plaintiff could have established the fact essential to jurisdiction, or have conferred jurisdiction. If under a citation said to have been *in rem*, all the world was present when the ordinary made his grant, the existence in life of the plaintiff was destructive of the proceeding; his own assent to it would have been nugatory, and his plea or other act by which jurisdiction over a person might be sustained would necessarily

have contradicted the fact which was indispensable to any exercise of the ordinary's authority.

Under a comparison of the several merits of these parties, blame and laches have been imputed to the plaintiff for his long-continued neglect of his property and friends, by which others were misled. Of the reasons of the plaintiff's conduct we are not informed. It is enough that he was under no legal obligation to stay where his property was, or to give information concerning himself when he was away. He encountered the risk of the statute of limitations, which, if his absence had been a little longer, would have forever barred him. The case must be decided just as if he had been immured in a dungeon, or otherwise compelled to remain unheard of, during his long absence.

3. The grant of administration, having been made without jurisdiction, was entirely void as to all persons and for all purposes. No revocation of it was necessary, and for the plaintiff to have asked a revocation might have been said to imply his acknowledgment of its temporary validity.

This court is satisfied with the instructions which were given to the jury, and is compelled to overrule all the grounds which have been taken for the defendant's motion.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

ADMINISTRATION ON ESTATE OF LIVING PERSON.—The grant of letters testamentary or of administration on the estate of living person, who is supposed to be dead, is beyond the jurisdiction of a probate or surrogate's court, and is utterly void. No person dealing with the executor or administrator can be protected. This proposition is so well established by text-writers, decisions, and *dicta*, that its correctness cannot now be questioned: Freeman on Judgments, sec. 319 a; *In re Napier*, 1 Phillim. 83; *Allen v. Dundas*, 3 T. R. 130; *Griffith v. Frazier*, 8 Cranch, 9, 24; *Lavin v. Emigrant Industrial Savings Bank*, 18 Blatchf. 1; *Duncan v. Stewart*, 25 Ala. 408; S. C., 60 Am. Dec. 527; *Beckett v. Selover*, 7 Cal. 215, 237; *Stephenson v. Superior Court*, 62 Id. 60; *Thomas v. People*, 107 Ill. 517; S. C., 47 Am. Rep. 458; *Moore v. Tanner's Adm'r*, 5 T. B. Mon. 42; *Burns v. Van Loan*, 29 La. Ann. 560; *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Morgan v. Dodge*, 44 N. H. 255, 259; *Roderigas v. East River Savings Institution*, 76 N. Y. 316; S. C., 32 Am. Rep. 309; *McPherson v. Cunliff*, 11 Serg. & R. 422; S. C., 14 Am. Dec. 642; *Peeble's Appeal*, 15 Serg. & R. 39, 42; *Devlin v. Commonwealth*, 101 Pa. St. 273; S. C., 47 Am. Rep. 710; *D'Arusment v. Jones*, 4 Lea, 251; S. C., 40 Am. Rep. 12; *Fisk v. Norvel*, 9 Tex. 13; *Withers v. Patterson*, 27 Id. 490, 496; *Andrews v. Avery*, 14 Gratt. 229, 236; *Melia v.*

Simons, 45 Wis. 334; S. C., 30 Am. Rep. 746. There is but a single case opposed to this array of authorities: *Roderigas v. East River Savings Institution*, 63 N. Y. 460; S. C., 20 Am. Rep. 555; but ever since it has been decided it has been very much criticised and questioned, and must be regarded as overruled by a case which afterwards arose between the same parties: *Roderigas v. East River Savings Institution*, 76 N. Y. 316; S. C., 32 Am. Rep. 309. Rosa, J., in *Stevenson v. Superior Court*, *supra*, thus tersely states the doctrine: "Administration may lawfully be had upon the estate of a dead man, but not upon that of one in life. Until death occurs, there is no 'subject-matter' over which it is possible for any court to exercise jurisdiction. It is true that the court of probate, before issuing letters of administration, must first determine affirmatively the question of death. But notwithstanding such determination, the fact that the supposed intestate is alive may still be shown, and when shown, establishes the nullity of the entire proceedings."

YOUNG v. DE BRUHL.

[11 RICHARDSON'S LAW, 633.]

GRANTEES ARE TENANTS IN COMMON, where the deeds under which they claim cover the same land, bear the same date, are founded upon surveys recorded and certified on the same day, and purport to have been made upon warrants issued on the same day.

TRESPASS to try title. The facts are sufficiently stated in the opinion. The plaintiff had a verdict, and the defendants appealed and moved for a new trial.

Kershaw and Taylor, for the appellants.

Caston, *contra*.

By Court, WITHERS, J. The case is unique in this: that the grants under which the opposing parties claim bear the same date, the surveys were recorded and certified the same day, and purport to have been made upon warrants issued the same day. So far, therefore, as time is concerned, as to every step pursued by the grantees, they seem to be *in equali jure*. Neither grant is for the parcel of land in dispute exclusively, each covers it, but each embraces other land outside its limits. Neither grantee lived on or used or occupied the *locus in quo*, but each resided on a portion of land within the grant. So we have not here the priority of survey which enabled the court to distinguish between two grants of the same date in the case of *Guignard v. Felder*, 2 Hill (S. C.), 401.

We cannot regard either of the grants as void, nor give one priority over the other. If one instrument had issued granting the land to both, they would have been joint tenants, as

at common law, without dispute. But are there not all the unities which make that estate in the sense of the common law in this instance? There is unity of time, of interest, of title (though by two several instruments from the same grantor, issuing *uno flatu*, so far as we know), and of possession. We can make nothing else out of this state of affairs but a tenancy in common between these parties, regarding them respectively as alienees by mesne conveyances from the grantees. The consequence is, that without proof of ouster neither can maintain this action against the other.

Whether Young has not conveyed his interest by deed in favor of his children becomes an unnecessary question to be decided now. It appears to some of the court, if not to all, that the proof of delivery of the deed was sufficient; but if not, still that the statute of uses operated to vest the whole estate in the donees, and superseded delivery.

A new trial is ordered.

O'NEALL, WARDLAW, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion granted.

THE PRINCIPAL CASE is certainly a unique one. Mr. Washburn, in his work on real property, vol. 1, p. 653, 4th ed., gives it as an illustration of the following proposition: "It may be generally stated that in this country, wherever two or more persons acquire the same estate by the same act, deed, or devise, and no indication is therein made to the contrary, they will hold as tenants in common."

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

HINSON v. HINSON.

[5 SWEED, 222.]

NOTICE OF PLACE OF SALE OF LAND UNDER EXECUTION, as well as of the time thereof, is required by the statute to be given to the execution defendant by the sheriff, and if the notice given fail to specify the place of sale, the sale is void; and the presence of the defendant in town on the day of the sale is no waiver of such notice.

EJECTMENT. The opinion states the case.

H. Wright, Bateman, and J. R. Hubbard, for the plaintiff in error.

T. M. Jones and M. and H. Brown, for the defendant in error.

By Court, **TOTREN**, Special Judge. Ejectment, in the circuit court of Perry, for three hundred acres of land; judgment for the plaintiff, and the defendant, **Elijah Hinson**, appealed in error to this court.

The title of plaintiff below is founded on an execution sale; the defendant, **Elijah Hinson**, who was also the defendant in said execution, was in possession and residing on said land at the time of the levy and sale. The sheriff, having levied on the land, served the defendant with the following notice, to wit:

“**MR. ELIJAH HINSON**—*Sir*: On the first Monday of February next I shall proceed to sell your land to satisfy two executions in favor of **John Hinson** and others; this second day of January, 1854.”

It appears, also, that the sale was at the court-house, and the defendant was present in the town on the day of the sale. His

honor the circuit judge was of the opinion, and so instructed the jury, that the notice is a valid compliance with the act of 1799, chapter 14, though the place of sale be not named; it being, as he stated, "the universal practice to sell at the court-house door under executions."

In these instructions, we are of opinion that there is error.

The act of 1799, c. 14, sec. 1, provides that "where the defendant is in actual possession of the land executed, it shall be the duty of the sheriff or coroner levying such execution to serve the defendant with written notice, stating that said execution is levied on said land, and mentioning the time and place appointed for the sale thereof at least twenty days previous thereto."

The act is clear and explicit that the time and place of sale shall be stated. And the intent is, that the defendant may attend the sale, divide the land into lots, if he think proper, and otherwise protect his interests in the important proceeding of selling out his homestead.

As to the practice or usage stated in the instructions, we may observe that if it be true, yet it is not imperative—not required by any statute—and the sale may be appointed at a place other than the court-house; and certainly it cannot be permitted that a mere usage shall dispense with the positive provision of the statute, made for the benefit of the debtor, and in the observance of which he is deeply interested.

"The right conferred upon the debtor by the statute should not be taken away by construction; and the duty it imposes on the officer is plain and simple, and can better be performed in the manner required by the statute than in any other manner which he might suppose to be equivalent:" *Richards v. Meeks*, 11 Humph. 456.

We conclude that the notice in question was wholly insufficient.

2. The defendant was present in the town on the day of sale, and thereon it is argued that a written notice was not necessary; and *Noe v. Purchapile*, 5 Yerg. 216, is relied upon. That case was decided upon the ground of a "waiver of notice," and does not apply.

In *Carney v. Carney*, 10 Yerg. 491 [31 Am. Dec. 590], the defendant was "present, knew of the sale, and did not object;" and it was held to be no waiver of the notice required by the statute.

We think it very clear that in the present case there was no

legal notice, and no waiver or notice. For this defect in the proceeding, as it now appears, the sale is merely void.

Reverse the judgment and remand the cause.

FAILURE OF SHERIFF TO GIVE NOTICE OF SALE AS PROVIDED BY LAW does not vitiate the sale, such statutes being regarded as directory only, and not mandatory: *Smith v. Randall*, 65 Am. Dec. 475, and note citing prior cases 480; *Hobbs v. Murphy*, 64 Id. 194, note 195; though a sale may be set aside on this ground: *Trustees of Schools v. Snell*, 68 Id. 586, note 587.

HOUSTON v. AYCOCK.

[5 SNEED, 406.]

PURCHASER AT CHANCERY SALE ACQUIRES NO TITLE TO ESTATE UNTIL CONFIRMATION OF SALE. He is not liable in the interim to any loss or injury that may happen to the estate, and may, on proper grounds, refuse to execute the purchase.

BEFORE CONFIRMATION OF CHANCERY SALE, BIDDINGS MAY BE OPENED on an offer to advance the price in a sum deemed adequate, supported by other reasons in favor of the application.

PURCHASER AT CHANCERY SALE BECOMES OWNER OF ESTATE AFTER CONFIRMATION, is subject to any loss or injury it may sustain, and is bound to execute the terms of his contract.

AFTER CONFIRMATION OF CHANCERY SALE, PURCHASER'S TITLE WILL NOT BE DISTURBED BY OPENING BIDDINGS upon an offer of an advance in price, however large, except in case of fraud, accident, mistake, or the existence of some relation of trust between the parties.

AFTER CONFIRMATION OF PARTITION SALE AT WHICH PLAINTIFF BECAME PURCHASER, the biddings will not be opened upon the offer by one of the defendants of double the price bid by the purchaser, on the ground that notice of the suit was given by publication, and that some of the defendants were minors.

BILL praying that partition sale be set aside, and that the biddings be opened. The opinion states the case.

Rogers and Somers, for the complainants.

Andrew McCampbell, for the defendant.

By Court, TOTTEN, Special Judge. The petitioners and defendant were tenants in common of lot No. 1, containing one quarter of an acre, in the town of Paris, the interest of defendant being three fourths thereof. Under a decree in chancery at Paris, directing a sale of said lot for division, the same was sold by the master on the sixth of April, 1857, to the defendant, at five hundred dollars, on a credit of twelve months, he being the highest bidder. This sale was reported to the court, and at July term, 1857, the sale was confirmed.

The petitioners instituted the present proceeding September

23, 1857, and pray "that said sale be set aside, and that the biddings be opened." They allege that the price given for the lot is not more than half its value, and said Andrew Houston, one of the petitioners, offers to advance the bid to one thousand dollars. They state that they are non-residents, and some of them minors; that they had no actual notice of said suit until after the sale was confirmed, the mode of proceeding being by publication under the order of the court. The defendant's demurrer to said petition was allowed, and the petition dismissed; thereon the petitioners appealed to this court.

We may observe that a purchaser at a chancery sale acquires no title to the estate until report and confirmation of the sale. He is not liable in the interim to any loss or injury that may happen to the estate, and may, on proper grounds, refuse to execute the purchase.

Therefore, before confirmation, the biddings may be opened on an offer to advance the price in a sum deemed adequate, supported by other reasons in favor of the application. As in *Childress v. Hurt*, 2 Swan, 492, the advance of price was thirty per centum on nine thousand five hundred dollars, and also there was ground to believe that the purchaser held the estate for the use of the debtor to the prejudice of creditors. So in *Morton v. Sloan*, 11 Humph. 278, the advance of price, and slight mistake in the number of acres, were the grounds relied on by the court in ordering that the biddings be opened.

The English rule is, that before confirmation of the sale, mere advance of price is sufficient to open the biddings: Sugden on Vendors, 66. But our cases, on grounds of well-considered policy, require something more: See *Owen v. Owen*, 5 Humph. 352; *Donelson v. Young*, 7 Id. 266; *Morton v. Sloan*, 11 Id. 281; *McMinn v. Phipps*, 3 Sneed, 200.

But after confirmation of the sale the purchaser has become the owner of the estate, is subject to any loss or injury it may sustain, and is bound to execute the terms of his contract. And therefore, after confirmation, no advance of price, however large, will have the effect to open the biddings; it can only be regarded as auxiliary to other grounds of much greater weight.

Thus in *Watson v. Birch*, 2 Ves. jun. 54, it is said that in "Gower's case it was decided that increase of price alone is not sufficient; but if fraud appears, that suspends the operation of the general rule." So in *White v. Wilson*, 14 Ves. 151, Lord Eldon, referring also to Gower's case, states the rule to be, "that after confirmation of the report, unless there is some misconduct upon the part of the individual who has the benefit

of that confirmation, the court will not open the biddings upon negligence, surprise, or circumstances of that kind; and that it is much better for the suitors that it should be distinctly understood that a report confirmed cannot be shaken unless upon such circumstances as were contained in that case; the party who confirmed the report being the steward of the family, and knowing more of the circumstances of the estate than he communicated. That was a case of surprise, generated by his own conduct, which Lord Thurlow thought gave a right to open the biddings in that instance. But if the purchaser's conduct is fair, there never would be an end of opening biddings after confirmation of the report."

It will be seen that in Gower's case, which so fully illustrates the subject, the biddings were opened on the ground of fraud in the purchaser. So in *Fergus v. Gore*, 1 Sch. & Lef. 350, Lord Redesdale held that after confirmation, the biddings could not be opened, except on the ground of fraud in the purchaser.

In *Henderson v. Lowry*, 5 Yerg. 243, Catron, C. J., says: "After a sale by a master, and that confirmed, the biddings cannot be opened on the offer of a higher price alone, unless some circumstance of fraud, mistake, or accident has occurred in the sale, or some trust relation exists between the parties;" and Green, J., fully concurs.

In *Mann v. McDonald*, 10 Humph. 279, the purchaser, for an adequate price, was guardian *ad litem* for certain minors interested in the estate, and the sale was set aside on account of the "trust relation" in conformity to the doctrine stated in *Henderson v. Lowrey*, *supra*.

We conclude that the purchaser, after confirmation, is to be regarded as owner of the estate according to his purchase; and his title will not be disturbed, by opening the biddings, except in case of fraud, accident, mistake, or the existence of a relation in trust.

Now, in the present case none of the grounds stated can have any application. No improper act is imputed to the purchaser. The lot being offered at public auction by the master, he had a perfect right to compete with others; and being the highest bidder, became the purchaser.

The notice of the suit by publication was such as the law permits and considers valid, and was all that could be legally given in the case. The offer to advance the price was in itself no ground for opening the biddings, and could only be regarded as auxiliary, but not necessary, to one of the principal grounds before stated.

The minority of some of the petitioners cannot alter the case. That is no ground to set aside the sale or open the biddings. If there be any ground to annul the decree, or the sale made in pursuance thereof, the minors have a day in court after they come of age to show the error; but if there be no error, it will bind them: *Mills v. Dennis*, 3 Johns. Ch. 367.

The decree of the chancellor will be affirmed.

WHEN PURCHASER AT JUDICIAL SALE MAY OBTAIN RELEASE FROM PAYMENT OF HIS BID: Note to *Burns v. Hamilton's Adm'r*, 70 Am. Dec. 572-586. After confirmation in many states, the objection comes too late: Id. 579. Destruction of the property before the completion of the sale: Id. 585; *Wagner v. Cohen*, 46 Id. 660.

SETTING ASIDE CHANCERY SALE UPON OFFER OF ADVANCE IN PRICE BID: *Littell v. Zuntz*, 36 Am. Dec. 415; see *Roberts v. Roberts*, 70 Id. 435. *Taylor v. Cooper*, 34 Id. 737.

EFFECT OF CONFIRMATION OF CHANCERY SALE: Note to *Burns v. Hamilton's Adm'r*, 70 Am. Dec. 579; note to *Tooley v. Gridley*, 41 Id. 633; *Taylor v. Cooper*, 34 Id. 737; *Newcomer v. Orem*, 56 Id. 717; *Evans v. Spurgin*, 52 Id. 105; *Hunter v. Hatton*, 45 Id. 117.

REMEDIES AGAINST PURCHASERS AT JUDICIAL SALES TO ENFORCE PAYMENTS OF BIDS: Note to *Mount v. Brown*, 69 Am. Dec. 365-375.

KIRKWOOD v. MILLER.

[5 SNEED, 455.]

CO-TRESPASSERS ARE ALL EQUALLY LIABLE FOR INJURY DONE BY ONE OF THEM in the prosecution of the common unlawful enterprise, and it is no defense for any one co-trespasser to say that the injury was greater than he intended, and that the particular act done was not contemplated or intended by him.

THREE PERSONS ARE JOINTLY LIABLE IN DAMAGES FOR ACT OF ONE OF THEM IN KILLING SLAVE, where the three, fearing a rumored insurrection of slaves, seized and tied the slave without justifiable cause, and upon his attempting to escape all pursued him, and one killed him, contrary to the intention of the other two.

PERSON IS NOT JUSTIFIED IN KILLING ANOTHER'S SLAVE by mere rumors of an insurrection among slaves, but there must be facts implicating the slave in an actual insurrection.

PUBLICATION IN NEWSPAPERS ON SUBJECT OF APPREHENDED INSURRECTION AMONG SLAVES, and other proof in that respect, not implicating the slave killed, is inadmissible in an action for damages for killing the slave.

CRIMINAL PURPOSE AND INTENT, EXPRESS OR IMPLIED, REQUIRED TO CONSTITUTE CRIME, is not in all cases essential to an action for an injury to person or property.

TRESPASS *vi et armis*. Verdict and judgment for the plaintiff, and appeal in error by the defendants. The opinion states the case.

Freeman, Hill, and Rains, for the plaintiffs in error.

I. R. Hawkins, Williams and Carthel, and Cardwell, for the defendant in error.

By Court, CAROTHERS, J. This case was before us at last term, upon an appeal in error, by the plaintiff, from a verdict and judgment against him. The action is trespass, for killing a negro man, slave of the plaintiff, by the defendants. The fact was never denied; but the defendants relied in that trial upon the ground that at the time they slew the slave they had good reason to believe, and did believe, that an insurrection of the negroes was then contemplated, and that the slave in question was engaged in it. In that trial the defendants were permitted by the court to give in evidence newspaper publications, the proceedings of public meetings, committees, and the general fears and apprehensions of the people on that exciting subject before and at that time.

We reversed that judgment, and gave a new trial upon the following grounds, as then stated in writing:

1. The publication in the newspapers on the subject of the apprehended insurrection, as well as all the other proof on that subject, not implicating the slave killed, was illegal evidence.

2. The proposition in the charge, "that the same evidence which would excuse the defendants from criminal responsibility would relieve them from civil liability," is not true, as a general rule, nor perhaps in application to this case. That criminal purpose and intent, express or implied, required to constitute crime, is not in all cases essential to an action for injury to person or property.

3. That part of the charge which holds "that if defendants honestly believed the slave Hard was engaged to an insurrection, they would be authorized to shoot him down, without any attempt to arrest or tie him, "though it may be correct in reference to a state of facts that might exist—where the danger was imminent and impending—was not so in application to the facts in this case, and was well calculated to mislead the jury. The slave was already tied, and could do no harm to any one; nor is there any evidence that he was engaged in an insurrection.

4. There is no legal evidence to sustain the verdict, even if

the charge of the court was unexceptionable. Nothing appears connecting this slave in any way with any insurrectionary scheme, if any such existed outside of the distempered imagination of the people, much less to authorize the reasonable belief on the part of the defendants that he was then engaged in an actual insurrection; and besides, they had him well bound with cords, and in a condition entirely harmless, so if there even had been any danger of him, it did not then exist. Without any necessity then, real or apparent, they destroyed the plaintiff's property, and are therefore liable for the value.

The case went back, and was tried in conformity to the law as declared in this opinion. There was a verdict against all of the defendants, for the value of the slave, eight hundred dollars.

It is admitted that the verdict against Kirkwood is right, but not so as to Denning and Osborn. A very ingenious and labored argument is made in favor of this position, but we are unable to concur in it. The negro was killed by the blow of Kirkwood; but the proof is ample that the other defendants were united with him in the act of tying the slave, in the first instance, without authority or sufficient cause; and after he attempted to escape from this unlawful confinement, it was a joint pursuit. It may be and doubtless was not intended by any of them that the negro was to be killed, yet if that resulted from the unlawful acts in which they were engaged, by the stroke of either, all would be equally liable for the damages. This is a risk that each joint trespasser incurs by his participation in an unlawful enterprise. If the expression may be used, they are guarantors for each other. They are all answerable for any injury done by either in the common enterprise. It is no defense against a claim for the damage done in such a case for any one to say that the injury was greater, and the particular act done was not contemplated or intended by him. They embark in a common cause, and their liability is common. How this would be in a criminal proceeding need not now be discussed. Other rules might apply to that.

We find no justifiable cause in the proof for the capture and confinement of the slave, in the first instance, even under the acts of assembly to which we are referred. He had not misbehaved himself in any way, had done no wrong, threatened none, and was entirely submissive and docile. After being thus unlawfully tied with a rope, he became alarmed at what he saw and heard around him, and in endeavoring to make his escape from this unlawful confinement, was slain by one of his

pursuers, in the joint purpose to recapture him, without any lawful cause or necessity that can justify the act in a suit for damages.

The wild panic and vague, undefined apprehensions about a "rising or insurrection of the slaves" at that time cannot be allowed to save parties from liability for the destruction of their neighbors' property. To justify this, they must stand upon facts, and not rumors and groundless alarms. This species of property, above all others, must be protected by the law from wanton abuse.

All proper principle, as well as the general interest of slaveholders, unite in establishing the necessity for the most stringent laws on this subject. Humanity, as well as the general interest, demand the enforcement of these laws.

Obedience and strict subordination are indispensable on the part of slaves; and so far as it has been thought necessary for these ends, power has been given to magistrates, and in particular cases, to individuals other than the owner. But all this is, as it should be, well defined and limited.

The legislature has been very careful in guarding slaves against the cruelty and violence of those having no interest in or authority over them. They are property, but have souls and feelings, and claims upon humanity. Those who take it upon themselves, in these periods of groundless panic, to slay and destroy, without the sanction of law, must do so at their peril. Every description of mob law and reckless invasion of the rights of others should be visited with the highest penalties. If this lawless spirit is tolerated or allowed to display itself with impunity, no man would be safe in his person or property in any community. Almost any other evil would be preferable to this. The law is, in general, sufficient for the redress of all wrongs, public and private. But if it should fall short, in particular instances, the evil had far better be endured than to throw off its restraints and permit men to take vengeance into their own hands.

There is no legal ground upon which any of the defendants can escape, and the judgment will be affirmed.

LIABILITY OF CO-TRESPASSERS—WHO ARE CO-TRESPASSERS. — All persons who command, instigate, promote, encourage, advise, countenance, co-operate in, aid, or abet the commission of a trespass by another, or who approve of it after it is done, if done for their benefit, are co-trespassers with the person committing the trespass, and are each liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves: Cooley on Torts, 133; 1 Waterman on Trespass, sec. 23; *Moir v. Hop-*

kins, 16 Ill. 313; S. C., 63 Am. Dec. 312, note 315; *Berry v. Fletcher*, 1 Dill. 67; *Smithwick v. Ward*, 7 Jones L. 64; *Smith v. Felt*, 50 Barb. 612; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Lewis v. Johns*, 34 Cal. 629; *Horton v. Hensley*, 1 Ired. L. 163; *Jones v. Morrell*, 1 Car. & K. 266.

LAWFULNESS OF ORIGINAL UNDERTAKING OR PURPOSE.—A distinction as to the liability of co-trespassers is based upon the legality or illegality of the original object sought to be attained by their joint endeavors. If one or more of several persons become tort-feasors while engaged in the accomplishment of a lawful object, even with a view to aid such purpose, the others, who neither direct nor countenance such tortious acts, are not liable: *Richardson v. Emerson*, 3 Wis. 319; S. C., 62 Am. Dec. 694. Where the common object is lawful, the assent of the others to the tortious act of one is not presumed, but is a matter of fact to be proved: *Id.* But when they are engaged in doing an unlawful act, the assent of the others to the tortious act of one is presumed, and the acts of any become the acts of all: *Id.*; *Kirkwood v. Miller*, 5 Sneed, 455; *Williams v. Sheldon*, 10 Wend. 654. Parties volunteering to aid one to take away chattels that have been conveyed by bill of sale which was absolute on its face, but in fact a security for a debt since extinguished, will not be heard to allege ignorance of the fact, and must stand, if at all, upon the justification of the principal: *Wallard v. Worthman*, 84 Ill. 446. The guilty knowledge of one trespasser is the knowledge of his co-trespassers: *Ously v. Hardin*, 23 Id. 403. Where an entrance into a house is effected by a deceit of one who afterwards by force admits others, all who thus gain admission are trespassers: *Kimball v. Custer*, 73 Id. 389.

CO-OPERATION IN ALLEGED ACT OF TRESPASS is necessary to constitute one a co-trespasser: *Olzen v. Schierenberg*, 3 Daly, 100; and where two persons acted each for himself, so as to conduce an injury to the plaintiff, they cannot be sued as joint trespassers. It must appear that they acted in concert: *Bard v. Yohn*, 26 Pa. St. 482. There must be, so to speak, a privity between the wrong-doers in order that each may be held responsible for the whole of the damages. This connection may be very slight, may result from chance or accident, as where the attachments of two different creditors are simultaneously levied upon property not the debtor's, they are jointly liable, this being a sufficient concert of action: *Ellis v. Howard*, 17 Vt. 330. Concert of action sufficient to create a joint liability among tort-feasors arises when the act is characterized by any of the attributes predicated in the definition of co-trespassers given above. And persons will be liable as co-trespassers whenever there has been concert of action amongst them in the commission of the tort: *Brooks v. Ashburn*, 9 Ga. 297; *Wallace v. Miller*, 15 La. Ann. 449; *Irvin v. Scribner*, Id. 583; *Woodbridge v. Conner*, 49 Me. 353; *Allen v. Craig*, 13 N. J. L. 294; *Judson v. Cook*, 14 Barb. 642; *Whitaker v. English*, 1 Bay, 15; *Chanet v. Parker*, 1 Mill. Const. 333; *Johnson v. Thompson*, 1 Baldw. 571; *Higby v. Williams*, 16 Johns. 215. Persons playing ball in a highway are liable as joint trespassers for an injury done by one of them in accidentally striking a traveler with the ball, in the course of the game, where the highway is so narrow as to make the playing of such games there dangerous to travelers: *Vosburgh v. Moak*, 1 Oush. 453; S. C., 48 Am. Dec. 613. A party is liable as a joint trespasser in an action for assault and battery, arrest, and false imprisonment, where he was engaged in a raid made by a party of about three hundred rebels which captured the plaintiff, although he was not present at the capture, but was with the capturing party at camp on the night of the capture, and was with the squad, for a considerable portion of the time and distance traveled by it, that took the prisoners captured on the raid, and among them the plaintiff, to Richmond. His connection with the

company, his presence with the parties having the prisoners in charge, and guarding them on the return and on the way to Richmond, shows his participation with the illegal detention and imprisonment, so as to fix his guilt in the premises as a joint trespasser: *Cole v. Radcliff*, 4 W. Va. 332. A sold a steer running at large on a prairie to B, and agreed to point it out on request. He pointed out by mistake a steer belonging to another man, and B killed this steer. It was held that trespass lay against both A and B jointly, though it would have been otherwise had the steer been pointed out by a stranger to the bargain: *Hamilton v. Hunt*, 14 Ill. 472. Where there is no such connection between persons as constitutes co-operation or concert of action, then there can be no joint liability: *Brooks v. Ashburn*, 9 Ga. 297; *Hubbard v. Hunt*, 41 Vt. 376; *Robinson v. Vaughton*, 8 Car. & P. 252; *Williams v. Sheldon*, 10 Wend. 654; *Adams v. Hall*, 2 Vt. 9. Where two men buy land, one to own the land and the other to have the timber upon it, if the owner of the wood, mistaking his bounds, cuts down timber on an adjoining lot, his associate is not liable in trespass unless he either induced it or was benefited by it: *Langdon v. Bruce*, 27 Vt. 657; see *infra*, "Presence," etc.

RATIFICATION OR ADOPTION OF TRESPASS FOR ONE'S BENEFIT MAKES ONE CO-TRESPASSER WITH WRONG-DOER: *Harper v. Baker*, 3 T. B. Mon. 422; S. C., 16 Am. Dec. 112; *Caldwell v. Sacra*, Litt. Sel. Cas. 118; S. C., 12 Am. Dec. 285; *Horton v. Hensley*, 1 Ired. L. 163. But that one may be a wrong-doer by ratification, the wrong must have benefited him or must have been done for that purpose and in his interest. In the language of Lord Coke, "he that agreeth to a trespass after it is done is no trespasser unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment:" 4 Inst. 317; see *Hull v. Pickeregill*, 1 B. & B. 282; *Wilson v. Tumman*, 6 Man. & G. 236; *Eastern Counties R. R. Co. v. Broom*, 6 Exch. 314; *Harrison v. Mitchell*, 13 La. Ann. 260; *Collins v. Waggoner*, Breese, 26; *Beveridge v. Rawson*, 51 Ill. 504; *Allred v. Bray*, 41 Mo. 484; *Grund v. Van Vleck*, 69 Ill. 479; *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479; *Brainerd v. Dunning*, 30 Id. 211; *Moir v. Hopkins*, 16 Ill. 313; S. C., 63 Am. Dec. 312, note 315; *Langdon v. Bruce*, 27 Vt. 657. The ratification must be made with a full knowledge of the facts or with a determination, without inquiry, to assume the responsibility for the act: *Fox v. Jackson*, 8 Barb. 355; *Adams v. Freeman*, 9 Johns. 118; *Lewis v. Read*, 13 Mee. & W. 834. And therefore it will not be conclusive of his liability that a party receives and appropriates a benefit accruing from the wrongful act: *Hyde v. Cooper*, 26 Vt. 552; *Lewis v. Read*, 13 Mee. & W. 834; or that he endeavors to bring about a compromise: *Roe v. Birkenhead, etc. R'y Co.*, 7 Exch. 36; S. C., 7 Eng. L. & Eq. 546; or that he employs counsel for the defense of the trespasser: *Buttrick v. Lowell*, 1 Allen, 172; *Eastern Counties R. R. Co. v. Broom*, 6 Exch. 314; see *Woolen v. Wright*, 1 Hop. & O. 554. And one may avoid liability which would otherwise accrue to him by disavowing the act. Thus, when directly after the seizure, under execution, of property not liable to be seized, the plaintiff in execution disavows the act of the officer, no action will lie against him for damages, but when no disapprobation of the officer's conduct is manifested, and the plaintiff permits the property seized to remain under seizure for his benefit, he is liable as a co-trespasser with the officer: *Harrison v. Mitchell*, 13 La. Ann. 260. By ratification or approval a master becomes liable for the servant's torts, even when they are without the scope of his employment: *Moir v. Hopkins*, 16 Ill. 313; S. C., 63 Am. Dec. 312; *Blair & Son Coal Co. v. McCulloh*, 59 Md. 403; note to *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 379-389; and note to *Ware v. Barataria & L. Canal Co.*, 35 Id. 201.

Where miners acting under instructions of a manager mined beyond the line of the company's property into the plaintiff's adjacent land, and the company sold the coal and retained the proceeds, it was held that the company and the manager were jointly liable for the trespass, although the manager had been cautioned to keep within the company's land, and had crossed beyond it by mistake: *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403. The master and servant are jointly liable for a trespass committed by the latter in performing an act within the scope of his service: *Hewitt v. Swift*, 3 Allen, 420.

PRESENCE AT COMMISSION OF TRESPASS.—Mere presence at the commission of a trespass is not sufficient to constitute one a co-trespasser. One who is only a spectator, innocent of any unlawful intent, and neither countenances nor approves those engaged in the tortious act, cannot be held liable because of his mere presence or failure to use active endeavors to prevent the commission of the trespass: Hale P. C. 459; Roscoe's Cr. Ev. 201; *Brown v. Perkins*, 1 Allen, 89. All who instigate, promote, encourage, co-operate in, aid, or abet the commission of a trespass are guilty; but persons will not be deemed guilty simply because they were present at the commission of a trespass which they did not aid or abet, and in which they neither participated nor had an interest: *Berry v. Fletcher*, 1 Dill. 67. But any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same, is in law deemed to be an aider and abettor, and liable as a principal; and proof that a person is present at the commission of a trespass without disapproving or opposing it is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it, and was thereby aiding and abetting the same: *Brown v. Perkins*, 1 Allen, 89; *McManus v. Lee*, 43 Mo. 206; *Olsen v. Upsahl*, 69 Ill. 273. There are no accessories in trespass, but all who are concerned with the trespass in any manner are principals. The person who commands or stands by and approves is guilty in like manner with the one who does the act: *Olsen v. Upsahl*, 69 Id. 273. One who is present and aiding and defending another trespasser is equally liable: *Smith v. Felt*, 50 Barb. 612; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Lewis v. Johns*, 34 Cal. 629. A boy ten years old was forcibly put on board a freight train by the brakeman, and against his will carried five miles. He returned home on foot, running most of the way, and was taken sick, and became permanently crippled in both legs. It was held that the brakeman was liable in trespass, and that the conductor of the train, who was present and directing or consenting to the acts of the brakeman was also liable as a joint trespasser: *Drake v. Kiely*, 93 Pa. St. 492. Where there is a common intent among several to beat an adversary, or where the parties are all present aiding and abetting or encouraging, or have become principals by previously counseling the violence, a joint verdict against all is proper: *Smithwick v. Ward*, 7 Jones L. 64. Though a person who was present did not participate in the tortious taking of chattels, still his assistance in conveying them away may render him a principal in the trespass: *Prince v. Flynn*, 2 Litt. 240. Where one goes in aid of a person who commits a trespass, though he takes no further part in it, he will be guilty of trespass: *Clark v. Bales*, 15 Ark. 452. In an action against three for a joint trespass, in killing a horse by careless driving, it appeared that one of the defendants lent the wagon to the others, and rode with them by invitation; but that after the accident he acted as one of the party jointly concerned, and it did not appear that he at

any time dissented from the manner of driving. It was held that he was equally liable with the others, and not to be regarded as a mere passenger: *Bishop v. Ely*, 9 Johns. 294. But in *Hubbard v. Hunt*, 41 Vt. 376, it was held that where one who knew that a bailee of a team had hired it to go to one place, rode with him to another, in violation of the bailee's duty, he was not liable as a trespasser in so doing. Where, however, two persons were riding in a wagon along the highway, and one of them jumped out and shot a hare in an adjoining field, and brought it to the other, who remained in the wagon, the latter was held guilty of trespass: *Stacey v. Whitehurst*, 18 Com. B., N. S., 344.

ONE WHO COMMANDS COMMISSION OF TRESPASS IS JOINTLY LIABLE WITH TRESPASSER: *Olsen v. Upsahl*, 69 Ill. 273; *Moir v. Hopkins*, 16 Id. 313; S. C., 63 Am. Dec. 312; *Drake v. Kiely*, 93 Pa. St. 492; *Gauntlett v. King*, 3 Com. B., N. S., 59; *Robinson v. Vaughton*, 8 Car. & P. 252; *Adams v. Hall*, 2 Vt. 9; *Jones v. Morrell*, 1 Car. & K. 266; *Ross v. Fuller*, 12 Vt. 265; see "Writs and Attachments," *infra*. One who directs or invites the commission of a trespass is guilty as a principal, and when sued for the act, cannot be permitted to show that the trespass would have been committed without his interference: *Coats v. Darby*, 2 N. Y. 517. Where a contractor, under orders from his employer, attempted to excavate for a building to a greater width than his employer's lot, so that the excavation encroached upon his neighbor's land, the employer was a co-trespasser with the contractor: *Williamson v. Fischer*, 50 Mo. 198.

ADVISING TRESPASS.—A party advising or aiding in committing a trespass is liable, though not personally present at the time of its commission: *Bell v. Miller*, 5 Ohio, 250. Where, however, the bailee of a horse sold it as his own, and when the real owner demanded the horse of the vendee the father of the vendee advised him to retain it till he had made further inquiry, the father was not liable as one who had advised or given countenance to the continuance of the unlawful detention: *Sartin v. Saling*, 21 Mo. 387.

MARRIED WOMAN CANNOT COMMIT TRESPASS IN CONNECTION WITH OR IN PRESENCE OF HUSBAND; for she is conclusively presumed to act under his authority and compulsion, and this is a good defense for her: *McKeown v. Johnson*, 1 McCord, 578.

SHERIFF IS JOINTLY LIABLE WITH HIS DEPUTY FOR LATTER'S MISFEASANCES. In an early case in Massachusetts it was held that a sheriff who was not present at the service of a writ when his deputy committed a trespass was not jointly liable with the deputy: *Campbell v. Phelps*, 1 Pick. 62; see *Moulton v. Norton*, 5 Barb. 286. But the better rule is, that the sheriff is always constructively present and jointly responsible for his torts: *Morgan v. Chester*, 4 Conn. 387; *King v. Orser*, 4 Duer, 431; *Waterbury v. Westervelt*, 9 N. Y. 598; *Balme v. Hutton*, 5 Bing. 471, 474; see *Woodgate v. Knatchbull*, 2 T. R. 148; *Grunnell v. Phillips*, 1 Mass. 529; *Knowlton v. Bartlett*, 1 Pick. 270; *Actworth v. Kempe*, Dougl. 41; *Campbell v. Phelps*, 17 Mass. 244; *Norton v. Nye*, 56 Me. 211. In *Waterbury v. Westervelt*, 9 N. Y. 598, it was said that where a sheriff has ratified the misfeasance of his deputy, he may be sued with him as a joint trespasser.

ATTACHMENTS AND OTHER WRITS.—*Liability of Plaintiff in Writ for Act of Officer thereunder*.—When an officer oversteps the authority of his writ and commits a trespass, as by levying on property not belonging to the debtor, the plaintiff in the writ, who neither advised, directed, nor assisted the officer in his departure from the command of his writ, is not responsible with

the officer for the trespass: *Wilson v. Tumman*, 6 Man. & G. 244; *Whitmore v. Greene*, 13 Mee. & W. 104; *Walley v. McConnell*, 13 Q. B. 911; *Averill v. Williams*, 4 Denio, 295; *Chapman v. Douglass*, 5 Daly, 244; *Abbott v. Kimball*, 19 Vt. 551; see *Bissell v. Gold*, 1 Wend. 210; *Taylor v. Trask*, 7 Cow. 249; *Syndacker v. Brosse*, 51 Ill. 357. But if the plaintiff ratifies and adopts the tort of the officer, and retains or seeks to retain the benefit of it, he will then make himself jointly liable with the officer: *Ball v. Loomis*, 29 N. Y. 412; *Allen v. Crary*, 10 Wend. 349; *Root v. Chandler*, Id. 111; *Tompkins v. Haile*, 3 Id. 406; *Davis v. Newkirk*, 5 Denio, 94; *Nelson v. Cook*, 17 Ill. 443; *Syndacker v. Brosse*, 51 Id. 357; *Beveridge v. Rawson*, Id. 504; *Stroud v. Humble*, 2 La. Ann. 930; *Harrison v. Mitchell*, 13 Id. 260; *Knight v. Nelson*, 117 Mass. 458; *Wetzell v. Waters*, 18 Mo. 396; *Bonnell v. Dunn*, 28 N. J. L. 153; *Deal v. Bogue*, 20 Pa. St. 228; *Leach v. Francis*, 41 Vt. 670; see *Sprague v. Kneeland*, 10 Wend. 161. In England, however, it is held that where a sheriff has made himself liable as a trespasser, the ratification of his act by the plaintiff will not make him a trespasser also, since the sheriff is not his agent, but the agent of the law: *Wilson v. Tumman*, 6 Man. & G. 236, 242. See *Tilt v. Jarvis*, 7 U. C. C. P. 145; *McLeod v. Fortune*, 19 U. C. Q. B. 98. Merely accepting the proceeds of a levy, in the performance of which the officer has committed a trespass, does not of itself make the plaintiff liable, as where he does so without a full knowledge of the facts: *Lewis v. Read*, 13 Mee. & W. 834; or where the wrong consisted of a sale of the debtor's property without sufficient notice, and the plaintiff received the proceeds which were no more than he would have been entitled to under a lawful proceeding: *Hyde v. Cooper*, 26 Vt. 552. The plaintiff in attachment and his attorney were held liable in trespass upon the refusal to release the property of another than the defendant, which had been wrongfully levied on, although they were not present at the levy: *Cook v. Hopper*, 23 Mich. 511. In an action of trespass for unlawful taking of property under attachment, brought against the constable and original plaintiff, wherein they answered jointly, admitting the taking but denying ownership in the present plaintiff, it was held that the attachment plaintiff would be held to have adopted the taking and to be jointly liable with the constable: *Taylor v. Ryan*, 15 Neb. 573. The law does not attribute constructive possession to the owner of property which it has in its own control by means of an officer. A mere purchaser at a sale by the officer, who receives from him immediate possession, is not responsible in trespass. His purchase does not of itself make him a participant in the wrongful seizure, and he is not a trespasser by relation: *Gloss v. Black*, 91 Pa. St. 418.

By giving the sheriff a bond of indemnity against the consequences of his action, the plaintiff ratifies the sheriff's unlawful act and becomes jointly liable with him: *Berry v. Kelly*, 4 Robt. 106; *Herring v. Hoppock*, 15 N. Y. 409, 413; *Root v. Chandler*, 10 Wend. 110; *Knight v. Nelson*, 117 Mass. 458; *Crossman v. Owen*, 62 Me. 528; *Lewis v. Johns*, 34 Cal. 629; *Murray v. Lovejoy*, 2 Cliff. 191; S. C., 3 Wall. 1; see *Bishop v. Montague*, Cro. Eliz. 824.

Liability of Attorneys and Clients.—An attorney undertakes no responsibility with respect to a writ which he directs an officer to serve, except this itself, that he commands or directs the officer to execute the process pursuant to its precept. Therefore, if the writ is illegal, and the officer commits a trespass in serving it, the attorney is jointly liable with him: *Burnap v. Marsh*, 13 Ill. 535; *Sullivan v. Jones*, 1 Gray, 570. But the attorney is not liable for a trespass committed by the officer in overstepping the bounds of his process, or in acting in a manner which the writ, if legal, would not justify: *Averill v. Williams*, 1 Denio, 501; *Adams v. Freeman*, 9 Johns. 118;

Vanderbilt v. Turnpike Co., 2 N. Y. 479; *Ford v. Williams*, 13 Id. 577; *Seaton v. Cordray*, Wright, 102; *Cook v. Hopper*, 23 Mich. 511; unless he directs the tortious act, or counsels or assists in it, for then he becomes liable directly like any co-trespasser: *Hardy v. Keeler*, 56 Ill. 152; *Cook v. Hopper*, 23 Mich. 511. The client for whom the attorney acts in suing out an illegal writ is sufficiently in privity with the attorney to make him also liable for the trespasses committed under it: *Foster v. Wiley*, 27 Id. 244; S. C., 15 Am. Rep. 185; *Newberry v. Lee*, 3 Hill, 523; *Armstrong v. Dubois*, 4 Keyes, 291; *Barker v. Braham*, 3 Wils. 368; *Bates v. Pilling*, 6 Barn. & Cress. 38. But he is not responsible for any unlawful proceedings set in motion by the attorney, to which the client was not privy by advice, consent, or participation; and which his instructions did not justify nor authorize: *Freeman v. Roeder*, 13 Q. B. 780; *Ferguson v. Terry*, 1 B. Mon. 96; *Adams v. Freeman*, 9 Johns. 118; *Fox v. Jackson*, 8 Barb. 355; *Welch v. Cochran*, 63 N. Y. 181; S. C., 20 Am. Rep. 519.

A justice of the peace who issues an execution to arrest the body of a judgment debtor, and an attorney who procures such execution to be issued, and causes the debtor to be arrested thereon in a case in which both know that the law prohibits such arrest, or the issuing of such an execution, are jointly liable to the debtor in trespass: *Sullivan v. Jones*, 1 Gray, 570.

Creditors whose Writs are Served Simultaneously are Jointly Liable for Wrongful Levy.—In Iowa it has been held that to render attaching creditors jointly liable as trespassers they must be not only together at the time of the levy, but in concert of action and co-operation: *Eddy v. Howard*, 23 Iowa, 175. "But this conclusion may well be doubted:" Cooley on Torts, 136. In Massachusetts the levying of several writs simultaneously constitutes a sufficient concurrence and co-operation to make the respective plaintiffs jointly liable: *Stone v. Dickinson*, 5 Allen, 29, per Bigelow, J. In that case it was held that if several different creditors, acting separately, without concert and without knowing that they are employing a common agent, have wrongfully caused their debtor to be arrested on their several writs, by the same officer who served the writs simultaneously, and by virtue thereof committed the debtor to jail, where he was confined upon all the writs at the same time, they are joint trespassers. Two creditors whose attachments are served at the same time are *prima facie* jointly liable with the levying officer in case of a wrongful levy, but they may show that the taking on the two writs was at different times: *Ellis v. Howard*, 17 Vt. 330.

Trespass against Person Committed under Writ.—Where an officer calls in others to assist him in making an arrest, their justification is as broad as his own: *Main v. McCarty*, 15 Ill. 441; *Hess v. Johnson*, 3 W. Va. 645; *Durand v. Hollins*, 4 Blatchf. 451; *Hardage v. Coffman*, 24 Ark. 256. But if his authority is no justification to himself, neither is it to those whom he calls upon to aid him. He has no authority to command others to do a wrongful act, and those that obey such a command do so at their peril. They are bound to know the law, and must suffer if unfortunately ignorant of it: *Elder v. Morrison*, 10 Wend. 128; *Batchelder v. Whitcher*, 9 N. H. 239; *Lively v. Ballard*, 2 W. Va. 496; *Wilson v. Franklin*, 63 N. C. 259; *Hogue v. Penn*, 3 Bush, 663; *Leonard v. Stacy*, 6 Mod. 69. All assisting one who has no authority to take a person into custody are trespassers: *Marsh v. Williams*, 2 Miss. 132; *Johnston v. Wiley*, 13 Ga. 97. An officer having no execution against a debtor's body, and a creditor who, together with him, commits an assault upon the debtor, are jointly liable as trespassers: *Leach v. Francis*, 41 Vt. 670. In order to establish the defense of duress, the de-

defendant must show that he had no reasonable means of escaping from the force or fear before the trespass was committed: *Cunningham v. Pitzer*, 2 W. Va. 264.

CO-TRESPASSERS ARE JOINTLY AND SEVERALLY LIABLE.—The plaintiff may sue all, or any number of the co-trespassers less than all. Each is liable for the whole damage caused by all, and all together are jointly liable for the whole damage. It is no defense for one sued alone that the others who participated in the wrongful act are not joined with him as defendants; nor is it any excuse for him that his participation in the tort was insignificant as compared with that of the others. All the joint trespassers are jointly and severally liable for the whole damage caused by the trespass: *Farebrother v. Ansley*, 1 Camp. 343; *Wilson v. Milner*, 2 Id. 452; *Pitcher v. Bailey*, 8 East, 171; *Booth v. Hoagson*, 6 T. R. 405; *Merryweather v. Nixon*, 8 Id. 186; *Voss v. Grant*, 15 Mass. 505; *Wheeler v. Worcester*, 10 Allen, 591; *Campbell v. Phelps*, 1 Pick. 62; *Wilford v. Grant*, Kirby, 114; *Thwatt v. Jones*, 1 Rand. 328; *Dupuy v. Johnson*, 1 Bibb, 562; *Acheson v. Miller*, 18 Ohio, 1; *Wallace v. Miller*, 15 La. Ann. 449; *Moore v. Appleton*, 26 Ala. 633; *Rhea v. White*, 3 Head, 121; *Murphy v. Wilson*, 44 Mo. 313; *Silvers v. Nerdlinger*, 30 Ind. 53; *Bishop v. Ely*, 9 Johns. 294; *Williams v. Sheldon*, 10 Wend. 654; *Mayne v. Griswold*, 3 Sandf. 463; *Brooks v. Ashburn*, 9 Ga. 297; *Irvin v. Scribner*, 15 La. Ann. 583; *Woodbridge v. Conner*, 49 Me. 353; *Allen v. Craig*, 13 N. J. L. 294; *Judson v. Cook*, 14 Barb. 642; *Whitaker v. English*, 1 Bay, 15; *Chanet v. Parker*, 1 Mill Const. 333; *Johnson v. Thompson*, 1 Baldw. 571; *Hawkins v. Hatton*, 1 Nott & M. 318; S. C., 9 Am. Dec. 700; *Guille v. Swan*, 19 Johns. 381; S. C., 10 Am. Dec. 234; *Richardson v. Emerson*, 3 Wis. 319; S. C., 62 Am. Dec. 694; *Bruhl v. Parker*, 2 Brev. 406; *Wright v. Lathrop*, 2 Ohio, 33; *Page v. Freeman*, 19 Mo. 420; *Knickerbaker v. Colver*, 8 Cow. 111; *Knox v. Work*, 1 Brown, 101; *Knott v. Cunningham*, 2 Sneed, 204; *McGehee v. Shafer*, 15 Tex. 198; *Blann v. Crocheron*, 54 Am. Dec. 203, and note 205, 206. A co-trespasser cannot plead the non-joinder of his co-trespassers in abatement: *Rose v. Oliver*, 2 Johns. 365. Where several act in concert in entering on land and cutting timber, they may be sued as joint trespassers, though they do not share alike in the profits: *Williams v. Sheldon*, 10 Wend. 654. If the tort be of such a nature as to authorize it, the injured party may bring trover against one, trespass against another, and detain against a third, if his possession was obtained by means of the tortious acts of the others; and nothing short of a release or a satisfaction in one of these actions will operate as a bar to an action against the others: *Du Boss v. Marx*, 52 Ala. 506.

NO APPORTIONMENT OF DAMAGES.—Each co-trespasser is liable for the whole damage, and when there are several defendant co-trespassers the jury cannot apportion the damage on the basis of the culpability of each co-trespasser respectively and render separate verdicts for the amounts thus apportioned, and an instruction to this effect is erroneous. The verdict and judgment must go against all jointly in an amount which the most guilty of the co-trespassers should be obliged to pay: *Pardrige v. Brady*, 7 Ill. App. 639; *Berry v. Fletcher*, 1 Dill. 67; *Crawford v. Morris*, 5 Gratt. 90; *Carney v. Read*, 11 Ind. 417; *Layman v. Hendrix*, 1 Ala. 212; *Phultz v. Hunter*, 2 Browne, 233; *Duane v. Murkin*, Id. 238. In an action against several, the judgment should go against all the defendants, and not omit those who defaulted and failed to appear: *Bivins v. McElroy*, 11 Ark. 23; S. C., 52 Am. Dec. 258; *Lee v. Black*, 27 Ark. 337. It has been held that though it is error for the court to instruct the jury to sever the damages and assess respectively

what in their opinion each party ought to pay, yet the error is not one of which a defendant may complain, it not being to the disadvantage of any defendant: *Crawford v. Morris*, 5 Gratt. 90. And in South Carolina at one time it was the practice to apportion the damages among trespassers sued jointly according to the degree and nature of the offense committed by each: *Smith v. Singleton*, 2 McMull. L. 184; S. C., 39 Am. Dec. 122; but see *Berry v. Fletcher*, 1 Dill. 67. So in Kentucky: *Sodousky v. McGee*, 4 J. J. Marsh. 267; and see *Byrne v. Riddell*, 3 La. Ann. 670. Where the jury returned a verdict for a single sum, and then proceeded to apportion this sum among the several defendants, this apportionment was a nullity: *Carrier v. Swan*, 63 Me. 323. If an action is brought against one of several wrong-doers, the judgment should be what the most culpable ought to pay, whether the defendant be that person or not: *Bell v. Morrison*, 27 Miss. 68. In trespass against two, if the evidence authorizes exemplary damages against one, the other, if he is shown to have acted in concert with him, is liable to the same extent: *Hair v. Little*, 28 Ala. 236. In *Pardridge v. Brady*, 7 Ill. App. 639, however, it is said that if the plaintiff makes a case for exemplary damages against one of two defendants, and not against another, he may dismiss as to the latter and have his recovery against the former. Certainly, damages for the separate trespass of one of two defendants cannot be included in a joint judgment against both: *Symonds v. Hall*, 37 Me. 354; S. C., 59 Am. Dec. 53.

WHEN JOINTLY SUED, SOME MAY BE FOUND GUILTY AND OTHERS NOT. The defendants may plead separately or jointly, and the jury may find some guilty and others not: *Lansing v. Montgomery*, 2 Johns. 382; *Owens v. Derby*, 3 Ill. 26; *Drake v. Barrymore*, 14 Johns. 166; *Blackburn v. Baker*, 7 Port. 284. The rule applicable in actions of *assumpsit*, that if one defendant is proved not liable, the verdict must be in favor of all the defendants, does not apply in actions of trespass: *Gillerson v. Small*, 45 Me. 17. A verdict against all the defendants jointly cannot be sustained on evidence which fails to implicate all: *Grusing v. Shannon*, 2 Ill. App. 325.

WHEN PLAINTIFF RECOVERS SEPARATE JUDGMENTS, HE MUST ELECT DE MELIORIBUS DAMNIS. The injured party may recover separate verdicts and judgments against each of the co-trespassers, but he can have but one satisfaction: *Wright v. Lathrop*, 2 Ohio, 33; *Hawkins v. Hatton*, 1 Nott & M. 318; *Page v. Freeman*, 19 Mo. 420; *Knickerbacher v. Colver*, 8 Cow. 111; *Knox v. Work*, 1 Browne, 101; *Knott v. Cunningham*, 2 Sneed, 204; *McGehee v. Shafer*, 15 Tex. 198. If separate suits be brought against several defendants for a joint trespass, the plaintiff may recover separately against each, but he can have but one satisfaction; and he may elect *de melioribus damnis*, that is, choose the best verdict, and issue his execution therefor against one of the defendants; and the others are then, by the satisfaction of that judgment, released from all liability except payment of costs: *Livingston v. Bishop*, 1 Johns. 290; *Sodousky v. McGee*, 4 J. J. Marsh. 267; *Blann v. Crocheron*, 20 Ala. 320; S. C., 54 Am. Dec. 203; *Fleming v. McDonald*, 50 Ind. 278; *Golding v. Hall*, 9 Port. 169.

RELEASE OF ONE CO-TRESPASSER, OR SATISFACTION BY ONE CO-TRESPASSER RELEASES ALL. This results from the joint and several liability of the co-trespassers, and from the obviously just rule that the plaintiff can have but one satisfaction for the injury suffered. A satisfaction of the damages made by one or several of the co-trespassers to the party injured discharges the remaining co-trespassers from liability in the premises: *Cocks v. Jennor*, Hob. 66; *Brown v. Marsh*, 7 Vt. 327; *Frye v. Henkley*, 18 Me. 320; *Gilpatrick v. Hunter*, 24 Id. 18; S. C., 41 Am. Dec. 370; *Ayer v. Ashmead*, 31

Conn. 447; *Eastman v. Grant*, 34 Vt. 387; *Stone v. Dickinson*, 5 Allen, 29; *Snow v. Chandler*, 10 N. H. 92; S. C., 34 Am. Dec. 140; *Turner v. Hitchcock*, 20 Iowa, 310; *Mets v. Soule*, 40 Id. 236. And a release of one or more of the co-trespassers is a release of them all: *De Bosc v. Marx*, 52 Ala. 506; *Snow v. Chandler*, *supra*; *Gilpatrick v. Hunter*, *supra*; *Ellis v. Elson*, 50 Wis. 149; *McGehee v. Shafer*, 15 Tex. 198; even though the party giving the release stipulates that it shall not discharge the others: *Ellis v. Bitzer*, 2 Ohio, 89; S. C., 15 Am. Dec. 534. In some states it is necessary that the release should be under seal, for as the release is a satisfaction because it imports full payment of the damages, if under seal its consideration cannot be inquired into, and it therefore becomes conclusive, even if in fact given without consideration. *Snow v. Chandler*, 10 N. H. 92; S. C., 34 Am. Dec. 140; *Brown v. Marsh*, 7 Vt. 320; *Eastman v. Grant*, 34 Id. 387; *Stone v. Dickinson*, 5 Allen, 29; *contra*: *Bloss v. Plymale*, 3 W. Va. 393. The acceptance of the note of one of several co-trespassers in satisfaction of the wrong done by him releases the others, although the note remains unpaid, and is brought into court to be canceled: *Ellis v. Bitzer*, 2 Ohio, 89; S. C., 15 Am. Dec. 534. But in *Ayer v. Ashmead*, 31 Conn. 447, it is said that a note taken in satisfaction from one co-trespasser, but unpaid, is no satisfaction. See also *Allison v. Connor*, 36 Mich. 283; *Bronson v. Fitzhugh*, 1 Hill (N. Y.), 185. A partial payment made by a co-trespasser in satisfaction of the damages sustained from the joint trespass inures to the benefit of the others, and in an action against them it must be considered by the jury in determining the amount of their verdict: *Snow v. Chandler*, 10 N. H. 92; S. C., 34 Am. Dec. 140; *Chamberlain v. Murphy*, 41 Vt. 110. If one defendant is arrested on *ca. sa.*, and discharged by the plaintiff or by his consent, the court will discharge the other defendants from custody and order satisfaction to be entered of record, upon their stipulating to bring no action on account of their arrest and imprisonment: *Allen v. Craig*, 14 N. J. L. 102. The subsequent marriage of the plaintiff in an action of trespass with one of the joint trespassers operates as a discharge of the others: *Turner v. Hitchcock*, 20 Iowa, 310. A release to a person charged as a joint trespasser, who is not in fact liable to the releasor, does not destroy the right of action against those who are liable: *Id.* A covenant to sue one of two joint trespassers does not operate as a discharge of the other: *Snow v. Chandler*, 10 N. H. 92; S. C., 34 Am. Dec. 140; see *Golding v. Hall*, 9 Port. 169. Where part are acquitted and a part found guilty, setting aside the verdict as to the latter does not affect the validity of the acquittal of the former: *Brown v. Burrus*, 8 Mo. 26.

SATISFACTION OF JUDGMENT AGAINST ONE JOINT TRESPASSER BARS ACTION AGAINST OTHERS, AND IS SATISFACTION OF JUDGMENT AGAINST OTHERS EXCEPT THAT THEY ARE LIABLE FOR COSTS. Where several persons commit a trespass, their liability is joint and several, and the party injured may maintain an action against one or more or all at his election, and a judgment against one joint trespasser, but which is unsatisfied, is no bar to other actions for the same injury against co-trespassers. The contrary of this rule, however, prevails in England, where such an unsatisfied judgment is a bar to actions against the co-trespassers: *Blann v. Crocheron*, 54 Am. Dec. 203, and note 205, 206; *Cooley on Torts*, 136, 137. A satisfaction of a judgment against all made by one of the defendants is a satisfaction as against the remaining defendants, and a satisfaction of a several judgment against one is a satisfaction of other several judgments that have been recovered against other co-trespassers: *Id.*; *Livingston v. Bishop*, 1 Johns. 290; *Sodousky v. McGee*, 4 J. J. Marsh. 267; *Hawkins v. Hatton*, 1 Nott & M. 318; S. C., 9 Am. Dec. 700;

Smith v. Singleton, 2 McMull. L. 184; S. C., 39 Am. Dec. 122. But though the plaintiff enforces the satisfaction of his judgment against one defendant, this will not prevent him from collecting his costs in his other judgments, and he may take out executions for their collection: *Windham v. Wither*, Stra. 515; *Livingston v. Bishop*, 1 Johns. 290; *Knickerbacher v. Colver*, 8 Cow. 111; *First Nat. Bank v. Piano Co.*, 45 Ind. 5; *Ayer v. Ashmead*, 31 Conn. 447; *Sodousky v. McGee*, 4 J. J. Marsh. 267.

PRACTICE AND DEFENSES.—Where two are sued as joint trespassers, and one of them resides out of the county in which the suit is brought, the court has *prima facie* jurisdiction as to both, but if the evidence shows that the person residing within the county is not a co-trespasser with the other, the jury, under instruction from the court, should find in favor of the non-resident, no matter how much the evidence may show his separate liability for the trespass. But if in such case a verdict is had against the defendants and a new trial is moved for, the court should grant it as to both or neither; but if the court grant it as to the one who resides out of the county, and a new trial is had, and no exceptions are taken for that cause, the defendant in the new trial is estopped from availing himself of the error after the second trial and a second verdict against him: *Lee v. West*, 47 Ga. 311. In a joint action of trespass against several defendants, it is competent to show a provocation received by only one of them: *Davis v. Franke*, 33 Gratt. 413. If one who claims only a part of a tract of land is sued as a joint trespasser with others, claiming other parts of the tract, and instead of disclaiming as to the part not claimed by him unites with his co-defendants in denying generally the plaintiff's rights, he, by thus doing more than is necessary for his defense, renders himself jointly liable with his co-defendants for their wrongful holding: *Walker v. Read*, 59 Tex. 187.

CONTRIBUTION BETWEEN CO-TRESPASSERS.—As one co-trespasser may be held responsible, and made to pay the whole amount of damages accruing from the tort committed by himself in conjunction with his fellows, it becomes highly important to him whether he may recover from them a proportionate share of the amount he has been obliged to pay. The rule upon this matter is subject to important exceptions. But generally speaking, on the ground that *in pari delicto, melior est conditio defendentis*, and that one is not permitted to allege or take advantage of his own wrong, no right of contribution exists between wrong-doers and a co-trespasser who has been compelled to pay the whole amount of damages has no right to call upon his fellows to contribute to his relief: *Moore v. Appleton*, 26 Ala. 633; *Minnis v. Johnson*, 1 Duv. 171; *Peck v. Ellis*, 2 Johns. 131; *Acheson v. Miller*, 18 Ohio, 1; *Rhea v. White*, 3 Head, 121; *Anderson v. Saylor*, Id. 551; *Cumston v. Lambert*, 18 Ohio, 81; S. C., 51 Am. Dec. 442; *Herr v. Barber*, 2 Mackey, 545; *Baird v. Midvale Steel Works*, 12 Phila. 255; *Pearcy v. Clary*, 32 Md. 245; *Sels v. Unna*, 1 Biss. 521; S. C., 6 Wall. 327; *Armstrong v. Clarion Co.*, 66 Pa. St. 218; *Philadelphia v. Collins*, 68 Id. 106; *Coventry v. Barton*, 17 Johns. 142; *Stone v. Hooker*, 9 Cow. 154; *Miller v. Fenton*, 11 Paige, 18; *Rhea v. White*, 3 Head, 121; *Anderson v. Saylor*, Id. 551; *Spalding v. Oakes*, 42 Vt. 343; *Merryweather v. Nixan*, 8 T. R. 186; *Pearson v. Skelton*, 1 Mee. & W. 504; *Wooley v. Batte*, 2 Car. & P. 417; *Adamson v. Jarvis*, 4 Bing. 66; *Mitchell v. Cockburne*, 2 H. Black. 379.

An exception to this rule occurs when in the beginning the co-trespassers were not in the wrong, as when they engage in a legitimate undertaking in the pursuance of which they commit a tort unintentionally. Here if one is made to pay the damages he has an undoubted right to contribution. For

here it is not necessary to take advantage of his own wrong, for as "between himself and his associates he was not a wrong-doer at all:" *Cooley on Torts*, 147; *Bailey v. Bussing*, 28 Conn. 455; *Horback v. Elder*, 18 Pa. St. 33; *Moore v. Appleton*, 26 Ala. 633; *Nickerson v. Wheeler*, 118 Mass. 295; *Jacobs v. Pollard*, 10 Cush. 287; S. C., 57 Am. Dec. 105; *Wooley v. Batte*, 2 Car. & P. 417; *Pearson v. Skelton*, 1 Mee. & W. 504. It has been said that the test for determining whether there shall be contribution between co-trespassers is the common-sense rule, "namely, that when parties think that they are doing a legal and proper act contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere:" *Acheson v. Miller*, 2 Ohio St. 203; S. C., 59 Am. Dec. 663; see also *Grund v. Van Vleck*, 69 Ill. 479; *Ives v. Jones*, 3 Ired. L. 538; *Bryan v. Landon*, 5 Thomp. & C. 594. This rule is inaccurate, however, in that it fails to embody the universal principle that *ignorantia legis neminem excusat*; and there are undoubtedly cases where mere lack of intention or consciousness of wrong-doing in the commission of a tort would not entitle one to contribution. The true rule is, that joint wrong-doers have no right of contribution when there has been an intentional violation of law, or where the wrong-doer is to be presumed to have known that the act was unlawful: *Bailey v. Bussing*, 28 Conn. 455; *Acheson v. Miller*, 2 Ohio St. 203; *Moore v. Appleton*, 26 Ala. 633; *Jacobs v. Pollard*, 10 Cush. 287; S. C., 57 Am. Dec. 105; *Adamson v. Jarvis*, 4 Bing. 66, 73, per Best, C. J.; *Betts v. Gibbons*, 2 Ad. & El. 57, 74; *Humphreys v. Pratt*, 2 Dow. & Cl. 288; *Avery v. Halsey*, 14 Pick. 174; *Spalding v. Oakes*, 42 Vt. 343; *Cumpston v. Lambert*, 18 Ohio, 81. The test is, are the parties, as between themselves, wrong-doers? If they are, then they must take advantage of their own wrong in order to recover contribution, and if they are not, then it is not necessary for them to allege their own wrong. Whether or not they are as between themselves wrong-doers is determined by the test whether or not they knew or must have been presumed to have known that the act was wrongful.

Contribution lies where the defendants have, by mere negligence, obliged the plaintiff to pay damages: *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121. A judgment in tort was recovered against three defendants, jointly interested in the running of a stage, for an injury caused to a person on the road by the negligence of one of the defendants, who was driving. One of the defendants was compelled to pay the whole amount of the judgment, and was entitled to recover contribution in an action of *assumpsit* against the defendant whose negligence caused the injury: *Bailey v. Bussing*, 28 Conn. 455.

Where parties are not *in pari delicto*, and one is compelled to pay damages, he may sue the other for contribution: *Lowell v. Boston etc. R. R. Corp.*, 23 Pick. 24; S. C., 34 Am. Dec. 33. A joint trespasser is entitled to contribution for fees paid by him to the counsel who defended the suit: *Pearcy v. Clary*, 32 Md. 245. In *Goldsborough v. Darst*, 9 Ill. App. 205, it was held that where the alleged fraud or wrong consisted in an attempt to deprive one of a lot of land unjustly, but which did not succeed, the rule of no contribution between wrong-doers would not apply. It was not like a case of trespass or negligence, the result of which is an injury and the grounds of recovery. The complaint for contribution must show the nature of the wrong for which judgment was obtained, otherwise the general rule of no contribution among wrong-doers must prevail: *Hunt v. Lane*, 9 Ind. 248.

A bond of indemnity against a liability for an act not known at the time to be unlawful is valid, and a bond to indemnify an officer against a possible wrongful act, under a process where a question of law or fact is in doubt, is lawful, and may be enforced: *Nelson v. Cook*, 17 Ill. 443; *Crossman v. Owen*, 62 Me. 528.

As between master and servant, if the servant caused an injury for which the master is compelled to respond in damages, but in relation to which no wrong is attributable to him except from the relation of master and servant, the master may call upon the servant for indemnity. On the other hand, if the master directs the servant to perform an act which he had reason to suppose was legal, but in the performance of which he unintentionally becomes a wrong-doer, he may call upon the master for indemnity: *Cooley on Torts*, 145, 146. Where the defendants replevy the judgment, it becomes thereby satisfied, and the legal responsibilities of the defendants among themselves are essentially changed. The transaction then assumes the character of a contract, by which the obligors in the replevin bond are jointly bound to pay the amount thereof, and each to contribute to the one who pays the whole amount of it: *Minnis v. Johnson*, 1 Duv. 171; see *Acheson v. Miller*, 18 Ohio, 1.

TRESPASSER CANNOT MAINTAIN TRESPASS AGAINST HIS CO-TRESPASSER: *Doolittle v. Linsley*, 2 Aik. 155; *Tubb v. Lynch*, 4 Harr. (Del.) 521.

DAMAGES CAUSED BY ANIMALS.—The several owners of domestic animals which unite in causing damage are not jointly liable for the wrong done, but each must be sued separately, and is liable only for the wrong done by his own animals: *Brady v. Ball*, 14 Ind. 317; *Partenheimer v. Van Order*, 20 Barb. 479; *Adams v. Hall*, 2 Vt. 9; *Buddington v. Shearer*, 20 Pick. 477; *Russell v. Tomlinson*, 2 Conn. 206; *Vansteenburgh v. Tobias*, 17 Wend. 502; *Auchmuty v. Ham*, 1 Denio, 495; *Wilbur v. Hubbard*, 35 Barb. 303; *Denny v. Correll*, 9 Ind. 72; *Powers v. Kindt*, 13 Kan. 74; *contra* in Ohio: *McAdams v. Sutton*, 24 Ohio St. 333; *Jack v. Hudnall*, 25 Id. 255; *Boyd v. Watt*, 27 Id. 259. Tenants in possession may be sued jointly in an action for trespass committed by animals kept by them in common upon the premises, although the several animals are owned by them separately and individually: *Jack v. Hudnall*, 25 Id. 255. In an action to recover damages for trespasses of cattle, the plaintiff cannot recover for injuries done by the cattle of a third person after the original entry and trespass: *Berry v. San Francisco etc. R. R. Co.*, 50 Cal. 435. The joint owners of a ram, known by them to be particularly addicted to butting, are jointly liable for damages done by the butting of the ram: *Oakes v. Spaulding*, 40 Vt. 347.

EAST TENNESSEE & GEORGIA R. R. Co. v. ST. JOHN.

[5 SNEED, 524.]

RAILROAD COMPANY MUST EXERCISE UTMOST CARE AND DILIGENCE to avoid running over person on their track.

RAILROAD COMPANY IS LIABLE TO OWNER OF SLAVE, a negro boy eight years old, who is run over and killed while sleeping on the track, the engineer having failed to sound the whistle or check the speed of the train; and it is no excuse that when the boy was discovered the train could not have been stopped before reaching him, or that the whistle would not have alarmed him in time.

CONTRIBUTORY NEGLIGENCE IS NO DEFENSE WHERE NEGRO SLAVE EIGHT YEARS OLD is run over and killed while sleeping on a railroad track, for the child is too young, and the master of the slave is not chargeable with negligence in not watching his negro slave children and keeping them away from the road.

CASE for negligently killing a slave of the plaintiff. Verdict and judgment for the plaintiff, and appeal in error by the defendant. The opinion states the case.

J. B. Cooke and Jarnagin, for the plaintiff in error.

Trehitt, for the defendant in error.

By Court, **CARUTHERS, J.** St. John sued the railroad company for running over and killing his slave, about eight years old, and recovered damages to the amount of nine hundred and sixty-two dollars and thirty-three cents.

There is no controversy as to the fact, but the defense relied upon is, that the circumstances were not such as to make the company liable for damages. Objection is taken to the charge of the court in this, "that it was the duty of the engineer to use the utmost care and skill in the discharge of his duty, by a vigilant and careful lookout for objects on the track, to blow the whistle and check speed when necessary to protect life and property; that if injury could have been avoided by the utmost care and skill, by a careful and vigilant lookout for objects ahead, by giving proper signals, or by checking speed, the defendants would be liable for the value of the boy." And further, "that if the injury was occasioned by running the cars at too great speed at that particular point on the road, that would be such negligence as would render the defendants liable in damages; that if the negro boy was seen, or might have been discovered, if the engineer had kept a vigilant lookout for objects ahead on the track, in time to save his life, by checking speed or blowing the whistle, this would be such negligence as to make the company liable."

The court refused to charge as requested by defendant's counsel, to the effect that in order to make the company liable, it must be made to appear that the negro and his master "exercised the utmost care and diligence in avoiding danger," and if the negro was too young, then his master must do it, and the failure to do so was "gross and inexcusable negligence," and that in this case the plaintiff was virtually a trespasser and not entitled to recover. But the court refused to charge except as above stated.

We are aware that there is much discrepancy in the railroad cases of the different states, and still the principals of law which should govern them being derived from the same sources, it would seem, should be uniform, and perhaps would be more nearly so but for the statutory changes which have been made by the several states.

The policy of our own decisions has been, so far as consistent with the safety of life and property, to encourage and protect this most grand and useful improvement of the age. But the consequences of carelessness and want of due skill in their management are so frightful and appalling that the most strict and rigid rules of accountability must be applied, where there is any dereliction of duty. Every reasonable precaution must be used to avoid accidents and injury to others, at the peril of strict and ample accountability. They enjoy almost a monopoly in the business of common carriers wherever they exist, both as to persons and property. A necessity to patronize them is imposed upon all by the circumstances of the times, all other modes of travel and transportation having been superseded by this on account of its greater ease and astonishing speed. While on the one hand the courts should protect them with a strong hand against unjust demands, and injuries to their property, which popular prejudice may favor or inflict, on the other the security of life and property requires that they should be held to a strict, careful, and skillful performance of all the duties imposed upon them by law.

All will agree, however, that in the management of locomotives and trains, so powerful for mischief as well as good, the rules of liability for the destruction of life or property should be such as to impose the duty of very great care and diligence on the part of those who control them. In addition to the general requirements of the common law, that reasonable care and diligence shall be used, our statutes prescribe some things that shall be done by them to avoid injury to others. By the act of 1856, c. 94, sec. 8, a constant and vigilant lookout for objects on the road shall be kept up, and if any person, or stock, or other obstructions shall appear on the road, it is made the "duty of the engineer to blow the alarm-whistle, to put down on the brakes, and use all necessary means to stop the trains, and prevent the killing or injuring of persons, stock, or property." The ninth section makes the company responsible for "all damages accruing or resulting from a failure to perform said duty." The tenth section exonerates them from liability for injuries done to "persons, stock, or other property on their respective roads, if they shall have complied with the provisions of this act," but the proof shall devolve upon them. This act was intended as a modification of the very severe statute of 1853, c. 33, by which they were made liable at all events, and without regard to the care and precaution used by them.

Without reference, then, to the general rules of law on this subject, these statutes seem to have settled the test of liability in reference to all cases like the one now before us. But this occurred before the act of 1856, and must be governed by that of 1853, or the common law; and upon either we think the verdict right. In such a case as this, we think it not too strong to require the "utmost care and diligence," as charged by the court.

The negro boy of the plaintiff was asleep upon the road at a water-gap; he could have been seen a quarter of a mile before the place was reached by the locomotive, but was at first supposed to be a coat of one of the repair-hands; but then, on a nearer approach, was discovered to be a person, and no signal or alarm was given, or any attempt to check speed by letting down the brakes. They were then moving at rapid speed, but according to schedule at that part of the road. The excuse relied upon for not adopting the means necessary to avoid the destruction of life and property is, that they would have been ineffectual, on account of their proximity to the object when they discovered what it was. The law, as applied to the facts of this case, makes no such exception, and none such should be made. The sound of the whistle might have aroused the boy from sleep, or by the checking of speed upon letting down the brakes, he might have saved himself in an instant by falling into the ditch at the stock-gap, where he was lying, or dashing off the road on either side. But whether he would or could have done so, is not the question; their duty was the same whether he would have escaped or not; of that they were not to be the judges; the injunctions of the law upon them were peremptory. The consequence of disregarding this legal duty is unconditional liability for the damage done, in this sort of case.

The defendants, then, cannot complain at the charge of the court, for it was certainly not too strong against them. Though the rules of liability may not be precisely laid down, yet the instructions given are at least sufficiently favorable to the defendants. The duty enforced by the statute is plain and easy, and much better for these companies than the less certain rules of common law, depending on skill, diligence, and care for exoneration, or certain degrees of negligence for liability. But by either, the charge and judgment are right.

These plain and arbitrary rules, laid down by the legislature on this subject, will free us, in cases falling under the statute,

from the difficulty of reconciling the conflicting decisions of other states, or entering upon the doctrine of excusatory defense presented in the application made to the court by the defendant's counsel for instructions to the jury, and which was, therefore, properly refused. If the questions presented in the instructions asked arose in the case, the authorities relied upon would be examined. But they do not; as a child eight years old, and asleep at that, could not be charged with negligence, though possessed of reason, volition, and the power of locomotion. The principle insisted upon is correct—that negligence and want of proper care on the part of the person injured would defeat a claim for damages under certain circumstances. But that principle has no application to this case. Certainly the master was not required to watch his negro children and keep them away from the road.

The judgment was right, and will be affirmed.

CONTRIBUTORY NEGLIGENCE AFFECTING RIGHT TO RECOVER IN CASE OF CHILD: See *Daley v. Norwich etc. R. R. Co.*, 68 Am. Dec. 413, and cases cited in notes 420, 421; *Chicago v. Major*, Id. 553, note 559.

LIABILITY OF RAILROAD COMPANY FOR INJURY TO TRESPASSERS: See *Little Schuylkill etc. Co. v. Norton*, 64 Am. Dec. 672, and cases cited in the note 674, 675.

REDMOND v. BOWLES.

[5 SNEED, 547.]

RELATION OF LANDLORD AND TENANT DOES NOT EXIST BETWEEN VENDOR AND VENDEE, and the vendee entering under void contract of sale may buy in outstanding title superior to his vendor's, and rely upon it in ejectment or a bill in equity for possession prosecuted by the vendor.

VENDEE UNDER VOID CONTRACT OF SALE, WHO PURCHASES OUTSTANDING PARAMOUNT TITLE, is not liable to the vendor for the contract price less the amount necessarily expended for the better title, though he would have been so liable had the contract of sale been a valid one, even where the vendor had no title.

BILL in equity, dismissed by the chancellor, and appeal by the complainant. The opinion states the case.

Netherland and Heiskell, for the complainant.

Walter R. Evans, for the defendant.

By Court, CARUTHERS, J. Redmond sold to Bowles seventy-five acres of land by parol, and delivered to him the possession. Bowles paid the consideration, but afterwards recovered it back

by suit at law, upon the ground that the sale, being unwritten, was void, but continued to hold the possession, and procured a superior title to that of Redmond, under which he claims the land. This bill is filed for a writ of possession, on the ground that as Bowles went in under a contract with him he cannot dispute his title, or set up one adverse to his. Or if he could still hold the land, all he could claim, if the title of complainant under which he entered failed, would be what it cost him to get the better one; and he must pay the price with that abatement.

1. It is contended that the relation of landlord and tenant, or lessor and lessee, exists between them, or that the same principle must govern as to the inhibition to hold under an adverse title without surrendering the possession.

2. That if that be not so, and Bowles must be regarded as a vendee, he can only claim what it cost him to perfect the title, but not the whole value of the land.

It is admitted that Redmond's title was bad, and that which has been obtained by Bowles since his entry upon the land under such void contract is good and sufficient.

Bowles insists that the position occupied by him was not such as to preclude him in law from purchasing and enjoying the benefit of an adverse and paramount title, without any accountability in any form to complainant.

These are the questions presented for decision. The chancellor decided them against the complainant.

His position is the very reverse in almost every essential particular to that of tenant.

A purchaser, whether by valid or void contract, enters, claiming the title to the land, by virtue of his purchase; and a tenant disclaiming it, but admitting it to be in another, under whom he holds, and to the prejudice of whose right he is bound to do no act. Consequently he cannot buy or procure an unfriendly title, nor in any way assume an adversary attitude to his landlord, under whom he obtained and agreed to hold the possession. He must continue to hold as he entered, under and for his superior, and is estopped from disputing his title in any way, no matter how defective it may be. But the relation between vendor and vendee is entirely different, without regard to the validity of the sale. The claim of the vendee, and his possession, are from the first adverse to all others, not excepting the vendor. True, if the sale is not in writing, and the vendor has a good title, he can oust him, because he

has the superior title, never having legally parted with it, but not on account of the particular trust or confidential relation between them. In a contract of this kind, the vendee would be allowed to confront him with any title he may have procured, or any good title outstanding in another. He would have to recover upon the strength of his title, as in other cases. That the suit is in equity upon an ejectment bill, instead of an action of ejectment at law, can make no difference in this respect. The complainant cannot succeed unless he shows a good and the best title. It is not enough to create the estoppel that the party enters under the title of another, but he must expressly or impliedly agree to hold for him. It requires both to create the relation of landlord and tenant. A purchaser, even by void contract, enters as owner to hold for himself, and acknowledges allegiance to no one. His possession, then, being for himself, he may protect it, as best he can, without regard to the manner in which he obtained it, and if he can fortify himself with the best title, he is secure. His hands are not tied by these artificial rules, which upon sound policy are made to apply to the tenant. There is nothing in *Washington v. Conrad*, 2 Humph. 564, in conflict with this doctrine, where the proposition extracted is applied to the case in judgment; nor is there in *Winnard v. Robbins*, 3 Id. 614, where the defendant first entered as tenant; nor in *Caldwell v. Harris*, 4 Id. 24, where the tenant was not allowed to show that an administrator had no power to rent.

It is true that in *Beard v. Bricker*, 2 Swan, 51, it was held that where a verbal sale had been repudiated by both or either of the parties, the action of unlawful detainer would lie by the vendor, and that the possession could be recovered under the act of 1821, c. 14, and it may be that the reasoning in that case would seem to support this bill. That case was reluctantly and doubtingly followed in the case of *Sullivan v. Ivey*, 2 Sneed, 488, so far as to allow that action to be maintained, for the reasons there given. But those cases cannot govern this. In that action the title cannot be inquired into, but in ejectment, or a bill in equity for possession, the rule is entirely different. How can a court of equity direct the person in possession legally obtained, and under the protection of the best title, to surrender it up to one having no title whatever, under any circumstances except in cases of technical estoppel? Surely there can be no principle to authorize a thing so improper and unjust. It would violate all our ideas of equity

and justice. What would be the practical operation? The defendant would be turned out by the decree, because he got in under an invalid contract which had been abandoned, and then in another suit would be allowed to regain the possession upon his stronger and better title. This would give judicial proceedings the resemblance of a farce, and accumulate costs and expenses upon parties in the pursuit of their rights, without reason or necessity. Without direct and cogent authority we would not recognize a principle leading to such consequences. It is not easy for us to see the bad faith and want of common honesty imputed in the argument in the act of refusing to give up the possession of land obtained under an invalid contract, when it is discovered that the vendor had no title, or refuses to make one. In such a case there is nothing dishonest, or even immoral or against good faith, in the vendee's obtaining a good title from any quarter where it is to be had for his protection and security. It is a case of self-defense.

The case of *James v. Patterson*, 1 Swan, 310 [55 Am. Dec. 737], discusses the relation of these parties, and places the case upon the proper grounds.

If the suit were from the other side to recover back the consideration paid upon such a contract, the rule of equity would be that the possession should be returned, and the parties placed *in statu quo*. But that is not the sort of case now before us; that proceeding is passed and closed. If the vendor has neglected to avail himself of that principle at the right time, he has lost its benefits. It has nothing to do with the case now pending.

3. But is the plaintiff entitled to any relief on the aspect presented in his amended bill? That is, that the defendant must pay him for the land with the abatement of what he has necessarily expended for the better title. This is certainly so where there is a valid contract of sale, and even where the vendor has no title: *Meadows v. Hopkins*, Meigs, 185 [33 Am. Dec. 140]. But here there is no sale that is recognized by law; either party may disregard it as soon as it is made, and the one sue for any money that may have been paid, and the other for the land without notice. In such a case there is nothing passing from the vendor for the support and benefit of which the newly acquired title can inure, or upon which it can be ingrafted. There is no confidential relation established by contract, as in the case of a valid sale. The vendor has passed no title, and established no relation which imposes upon the

vendee any obligation to protect or defend his title. They are from the first at arm's-length, and both untrammelled. Each may act in relation to the land and the titles to it as if no trade had been attempted to be made. What they have abortively attempted to do may be made valid and binding by ratification and mutual consent, but not otherwise.

There is no hardship in the doctrine. The pretended vendor has parted with nothing, and if he has a title he can easily assert it, and regain the land, but if he has not, but the same is in the vendee, or another, he should not succeed in getting that which is not his, barely because he had wrongfully claimed and attempted to sell it.

There is no ground upon which he can stand in this court, and his bill was properly dismissed by the chancellor.

ENTRY ON LAND UNDER PURCHASE IS AMICABLE TO RIGHT OF VENDOR so long as the vendee looks to the vendor for title, but as soon as the deed is made, the vendee's possession becomes adverse to all the world, and when continued for twenty years, bars a suit to recover the possession: *Gossom v. Donaldson*, 68 Am. Dec. 725. A vendee entering under contract of sale is estopped from denying his vendor's title: *Hoen v. Simmons*, 52 Id. 291, and note citing prior cases 294.

VENDEE IN POSSESSION UNDER EXECUTORY CONTRACT of sale is estopped from setting up outstanding title: *Seabury v. Stewart*, 58 Am. Dec. 254, and cases cited in the note 259.

MEASURE OF DAMAGES AGAINST VENDEE for refusing to perform his contract for the purchase of land: *Garrard v. Dollar*, 67 Am. Dec. 241, and note 275-283.

REED v. WILLIAMS.

[5 SNEED, 580.]

TO SUSTAIN ACTION FOR SEDUCTION OF PLAINTIFF'S DAUGHTER, it is not necessary to show that the defendant used deception, flattery, or false promises to accomplish his purpose; it is sufficient if the seduction resulted from the solicitation, importunity, or from any means or arts used by the defendant.

IN ACTION FOR SEDUCTION, FEMALE CANNOT, IN TENNESSEE, BE INTERROGATED AS TO ACTS OF UNCHASTITY WITH OTHERS, since in this state this would subject her to criminal punishment, though her general character for chastity is involved in the issue, and may be impeached by general evidence, and persons who have had criminal intercourse with her may be called to testify to the fact.

GENERAL EVIDENCE OF PLAINTIFF'S REPUTATION AS MAN OF PROFLIGATE PRINCIPLES and dissolute habits is admissible in an action for the seduction of his daughter, but evidence of a particular fact in this respect is not admissible, such as that some time before the alleged seduction he had labored under the venereal disease.

CASE for seduction of the plaintiff's daughter. The opinion states the case.

T. A. R. Nelson, and L. C. and M. T. Haynes, for the plaintiff in error.

J. B. Heiskell, Netherland, and T. D. and R. Arnold, for the defendant in error.

By Court, McKINNEY, J. This was an action on the case brought by the defendant in error for the seduction of his daughter. Verdict and judgment for the plaintiff for three hundred dollars. The defendant appealed in error.

The first error assigned is upon the instructions of the court.

On the trial, it was insisted by the defendant's counsel that to make out a case of seduction it must be shown that the defendant prevailed by means of deception, flattery, or false promises, whereby the confidence of the person seduced was abused and her chastity overcome. But the court instructed the jury that "it was not necessary for the plaintiff to show that the defendant had used flattery or made false promises to his daughter; that it would be sufficient if the seduction resulted from the solicitation and importunity of the defendant to the daughter to indulge in criminal intercourse, in consequence of which she consented." There is no error in this instruction. So far as the right to maintain this action is concerned, it cannot be at all important by what means or by which of the multifarious devices of the seducer he may have prevailed in the accomplishment of his purpose. It is enough that by any means or arts he tempted or persuaded his victim to the surrender of her chastity.

2. The daughter was examined as a witness. The defendant's counsel put the question to her whether she had not had sexual intercourse with one Watkins, at a time and place specified, prior to her alleged seduction by the defendant. This question was objected to, and the objection was sustained by the court.

In this the court ruled correctly. We need not, for the determination of the question properly raised upon this record, enter upon any discussion of the vexed question whether a witness can be forced to answer a question to his own disgrace—a question, it seems, which is still open for consideration: 1 Stark. Ev., sec. 25. However this may be, it is well settled that a witness is not bound to answer any question if the answer would expose him to criminal punishment or penal

liability: *Id.*, sec. 23. And by our act of 1741, c. 14, sec. 9, fornication is made subject to penal punishment.

It is laid down by Greenleaf, 2 Greenl. Ev., sec. 577, that the general character of the female for chastity is considered to be involved in the issue, and may therefore be impeached by general evidence. But she cannot be interrogated as to acts of unchastity with others, though the persons who may have had criminal intercourse with her may be called to testify to the fact. The impeachment of her chastity, however, would not go to defeat the parent's right of action, but only in mitigation of damages.

3. The court refused to permit the defendant to introduce evidence to show that the plaintiff, some time before the alleged seduction of his daughter, had labored under the venereal disease.

In this there is no error. It seems that evidence is admissible to show that the plaintiff is a man of "profligate principles and dissolute habits:" 2 Greenl. Ev., sec. 579. But this must be done by general evidence of his reputation in that respect; evidence of a particular fact is not allowable.

. There is no error in the record, and the judgment will be affirmed.

CHASTITY OF FEMALE IS INVOLVED IN ISSUE IN CRIMINAL PROSECUTION FOR SEDUCTION: *Andre v. State*, 68 Am. Dec. 708, note 714.

SEDUCTION, CIVIL ACTION FOR.—This subject is treated *in extenso* in the note to *Weaver v. Bachert*, 44 Am. Dec. 162-178. Female's character for chastity: *Id.* 176. Character of husband or father suing for seduction: *Id.* 174.

DAVIS v. McNALLEY.

[5 SNEED, 582.]

EQUITY WILL CANCEL CONVEYANCE AND REINSTATE GRANTOR IN TITLE AND POSSESSION where he was an illiterate old man, and was induced to convey without consideration to his son-in-law by the false and fraudulent representations of the latter that some pecuniary liability might fall upon the grantor; and it is no defense that a party cannot allege his own fraud, since the grantor, having no creditors to be prejudiced by the conveyance, was guilty of no fraud.

BILL in equity. Decree for the complainant, and appeal by the defendant.

Brown and Cooks, for the complainant.

T. C. Lyon, for the defendant.

By Court, McKINNEY, J. On the fifteenth of June, 1849, the complainant was induced to execute to the defendant, who is his son-in-law, a deed of conveyance in fee-simple for a tract of land of one hundred and ninety-two acres, situate in Blount county.

This bill is brought to have the conveyance canceled, and to be reinstated in his title and possession of said tract of land. And it is attempted to repel the complainant, on the ground that the execution of the deed was prompted by a fraudulent purpose on his part.

For the purpose of presenting the question arising upon the record, it is sufficient to state that the defendant, by false and fraudulent representations repeatedly and earnestly pressed upon the complainant, succeeded in exciting an apprehension in the mind of the old man that by reason of a legal proceeding which had been set on foot in the neighborhood some sort of liability might, by possibility, ultimately fall upon him. What the nature of the supposed liability was, or how the complainant could possibly be implicated in the matter, was not stated. The complainant was not a party to the proceeding, and for anything disclosed in the record, had no connection with it. The whole matter seems to have been a false and fraudulent device to excite the complainant's fears, with a view to procure the conveyance in question.

The defendant protested, at all times prior to the execution of the deed, that he had no motive or purpose in urging the complainant to convey the land to him, except to hold the land for the former, until the supposed difficulty should have passed by. The complainant is illiterate, and cannot read or write, and the proof shows that the deed was not read to him. It is admitted that although the consideration of one thousand dollars is falsely recited in the deed, no consideration whatever was paid or promised. And the sole inducement to the conveyance was the fear of pecuniary liability, falsely excited by the defendant.

The chancellor decreed for the complainant, and we think properly.

This is not a case for the application of the cogent principle of courts of equity, that a party will not be heard to allege his own turpitude, or to found a claim to the intervention of the court in his behalf, upon a fraud, or other illegal or prohibited act in which he may have been a participator.

The complainant had no creditors, or at least none whose rights could have been prejudiced by the conveyance: nor is it

shown that he had done any act by reason of which he had subjected himself to a recovery in damages, in favor of any one. It is clear, therefore, that fraud in the legal sense, either actual or constructive, in fact or intent, cannot be imputed to him or predicated of the transaction, so far as he is concerned; on the contrary, it can be affirmed—upon the facts stated—as a conclusion of law, that there existed no fraud on the part of the complainant. It is certainly true that the complainant evinced great folly, weakness, or misplaced confidence; but for this he is not to be denied relief.

We are not inclined to weaken the force of the salutary maxim in question, but care must be taken that it be not misapplied, so as to hold out encouragement to the unprincipled, by the acts of falsehood and fraud, to entrap the unwary in their toils; upon the deliberate calculation that equity will not interpose to extricate or relieve their deluded victims.

Instances apparently growing out of this perversion of the doctrine are becoming too common, and must not be favored.

The decree will be affirmed.

DEED OF GIFT OBTAINED FROM IMBECILE PERSON BY MEANS OF FRAUD, misrepresentation, or imposition will be set aside: *Ellis v. Mathews*, 70 Am. Dec. 353; *Hill v. Nash*, 66 Id. 266, and note citing prior cases 267.

GILLIAM v. STATE.

[1 HEAD, 88.]

INQUIRY IN IMPEACHING WITNESS INVOLVES HIS WHOLE MORAL CHARACTER, and is not restricted merely to his general reputation for truth and veracity.

IMPEACHING WITNESS MAY PROPERLY BE QUESTIONED as to whether he knows the general reputation of the person whose credibility is in question, what that reputation is, and whether from such knowledge the witness would believe him upon his oath.

THE facts are stated in the opinion.

Hyde, Frazier, and Turney, for the prisoner.

Heiskell, Reese, and Minnis, for the state.

By Court, McKINNEY, J. The plaintiff in error was convicted in the circuit court of Marion, under the act of 1852, for placing obstructions on the track of the Nashville and Chattanooga railroad, and was sentenced to four years imprisonment in the

penitentiary. To reverse which judgment he has prosecuted an appeal in error to this court.

In the progress of the trial it was attempted on the part of the defendant to discredit a witness for the state. The court ruled that in doing so "the impeaching witnesses must confine themselves to his general reputation as to the trait in question—that is, for truth." In this it is said the court erred.

There seems to be some diversity of opinion upon this point in the American courts. In some of the states the inquiry is restricted to the general reputation of the witness for veracity, and in others the inquiry involves the whole moral character of the witness. The latter practice has received the uniform sanction of this court. It has been regarded as essential to the ends of justice that both the court and jury should have full opportunity of knowing the entire moral character of the witness where credit is sought to be impeached; in view of all which, it may safely be left to the jury to determine what degree of credit the witness is entitled to for truth, notwithstanding his other vices and immoralities of character, as his claim to veracity is the primary and important consideration.

There is, perhaps, scarcely less diversity of practice in regard to the questions to be put to the impeaching witness.

According to our practice, the proper inquiries are, whether the witness knows the general reputation of the person whose credibility is in question, what that reputation is, and whether, from such knowledge, the witness would believe him upon his oath: See *Ford v. Ford*, 7 Humph. 92, 101; 1 Greenl. Ev., sec. 461, and notes.

In this view, the circuit court erred in restricting the inquiry into the general reputation of the witness. And for this error, the judgment must be reversed.

INQUIRY IN IMPEACHING WITNESS EXTENDS TO HIS WHOLE MORAL CHARACTER, etc.: See *Blue v. Kibby*, 15 Am. Dec. 95, and extended note thereto 96, on impeachment of witnesses; *Allen v. Young*, 17 Id. 130; *Evans v. Smith*, Id. 74; *State v. Shields*, 53 Id. 147; but that moral character is not a subject of inquiry, see *Commonwealth v. Churchill*, 45 Id. 229; *Crane v. Thayer*, 46 Id. 142.

AS TO FORM OF PROPER INTERROGATORIES TO IMPEACH WITNESS, see *Blue v. Kibby*, 15 Am. Dec. 95, and extended note thereto on impeachment of witnesses 96; *People v. Mather*, 21 Id. 122; *Chess v. Chess*, Id. 350; *Johnson v. People*, 38 Id. 624; note to *Stanton v. Parker*, 39 Id. 529; and see *Phillips v. Kingfield*, 36 Id. 760.

VAUGHAN v. CRAVENS.

[1 HEAD, 108.]

CONTRACT OF LEASE BY ONE TENANT IN COMMON does not bind his co-tenants unless they concur.

COMPENSATION FOR IMPROVEMENTS WILL NOT BE ALLOWED where they do not enhance the value of the land, and are made by a party holding possession under a void lease.

THE facts are stated in the opinion.

Hopkins, for the complainant.

Burch, for the defendants.

By Court, WRIGHT, J. The bill in this case is filed to recover from the defendants compensation for certain improvements which the complainant alleges he made upon their lands, under a lease which was void because not in writing. The chancellor dismissed his bill, and he has appealed to this court. The lands were used for mining purposes in getting coal from certain ore beds.

The defendant Cravens owned one sixteenth of the lands, as a tenant in common with the other defendants, who owned the residue, and it is very clear from this record that whatever contract complainant had was with Cravens, and did not bind his co-tenants. It is denied in the answers that there was any lease; and Cravens, the only defendant who knows anything on the subject, says the contract was at first only to make a certain road, for which complainant at once was paid in coal then dug by defendant, and received by complainant; and that complainant was allowed afterwards only to dig out of a certain pit, which defendant had opened, under which he, without authority, and in defiance of defendant's wishes, went on and did the work at another place, for which he now asks compensation.

It is not very clear what the contract was, and the facts, as to this matter, we incline to think, are with the defendants.

But, be all these things as they may, the weight of the proof is that the improvements made by complainant have not enhanced the value of the land; while, on the other hand, he committed great waste in cutting timber, etc. Upon the entire record complainant is entitled to no relief, and we affirm the chancellor's decree.

TENANT IN COMMON CAN LEASE HIS INDIVIDUAL SHARE ONLY when he has authority from his co-tenants: *Mussey v. Holt*, 55 Am. Dec. 234, and note 241; *Blood v. Goodrich*, 24 Id. 121; *Hutchinson v. Chase*, 63 Id. 645.

COMPENSATION FOR IMPROVEMENTS WILL NOT BE ALLOWED UNLESS they are permanent and beneficial: See note to *Jackson v. Loomis*, 15 Am. Dec. 352, where the subject of improvements is discussed at length. Co-tenant is not entitled to compensation for improvements made by him on the common property: *Hancock v. Day*, 36 Id. 293; *Thurston v. Dickinson*, 46 Id. 56.

HUNTER v. STATE.

[1 HEAD, 100.]

SALE OF NOXIOUS AND UNSOUND FOOD.—Person engaged in business of furnishing provisions for market is bound to use ordinary prudence and care to avoid the sale of noxious and unsound food.

LIABILITY OF PRINCIPAL OR AGENT FOR SELLING UNWHOLESOME PROVISIONS.—If provisions sold for consumption are unsound, and the seller, or those employed by him in preparing them for market, might have known it by the exercise of ordinary care and diligence, the principal is criminally liable, whether in point of fact he knew it or not. But not so if the defendant did not know it, and could not have known it by ordinary and proper prudence and care.

INDICTMENT and conviction for the sale of unwholesome provisions by the agent of defendant.

Trigg and Temple, for the plaintiff in error.

Heiskell, for the state.

By COURT. This was an indictment and conviction for selling unwholesome food, and the defendant has appealed in error to this court.

The circuit judge charged the jury that the defendant and his agent should be held to ordinary prudence and care in ascertaining the true condition of the thing sold. If the pork was unsound, and the defendant might have known it by ordinary care and diligence on the part of himself or those employed by him in preparing it for market, he should be convicted, whether in point of fact he knew it or not. But if it was unsound, and the defendant did not know it, nor could have known it by ordinary and proper prudence and care, he would not be guilty. This charge seems to be sustained by the principles of the cases of *Rex v. Dixon*, 3 Mau. & Sel. 11; and *Rex v. Medley*, 6 Car. & P. 292; and by 1 Russell on Crimes, 7th Am. from 3d Lond. ed., 1853, 109, 110. In the last-named case, as quoted by Russell, it is said to be an indictable offense to convey the refuse of gas into a public river, and thereby to render the waters corrupt, insalubrious, and unfit for the use of man; and the directors of a gas company

are responsible for the acts done by their superintendent and engineer under a general authority to manage the works, though they are personally ignorant of the plan adopted, and though such a plan be a departure from the original and understood method, which the directors had no reason to suppose was discontinued; for if persons, for their own advantage, employ servants to conduct works, they are answerable for what is done by those servants. And in *Rex v. Dixon, supra*, the master seems to have been held criminally liable for the acts of his servants done in the course of their employment, where due care was not used by him in the sale of the noxious article.

The judgment will be affirmed.

LIABILITY FOR SELLING NOXIOUS AND UNSOUND FOOD.—1. CIVIL LIABILITY.—a. *No Implied Warranty in Sale of Provisions as Merchandise.*—That learned commentator, Blackstone, lays down the unqualified doctrine that in contracts for provisions it is always implied that they are wholesome: 3 Bla. Com. 165; but this rule has not received the approval of the courts either in this country or in England, and has not been applied in its unqualified form. The cases clearly show that a distinction is to be drawn between a sale of provisions for domestic use, and one where the provisions have been sold as merchandise, or for resale. There are numerous cases showing that in all sales of provisions for immediate domestic use there is an implied warranty that they are wholesome and fit for use, but that this warranty extends no further, and does not cover a sale of provisions for any other than immediate consumption: *Humphreys v. Comline*, 8 Blackf. 521; *Jones v. Murray*, 3 T. B. Mon. 83; *Ryder v. Neitge*, 21 Minn. 70; *Moses v. Mead*, 1 Denio, 378; S. C., 43 Am. Dec. 676, affirmed in 5 Id. 617; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Rocchi v. Schwaabacher*, 33 La. Ann. 1364. Thus it has been held that in the sale of a live cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use: *Howard v. Emerson*, 110 Mass. 320; S. C., 16 Am. Rep. 608. So where the defendant sent pigs inflicted with a contagious disease to a public market to be sold, and which were exposed for sale, his conduct in exposing the pigs for sale in the market was held not to amount to a representation that they were free from disease, particularly where the sale took place on the condition that no warranty would be given by the auctioneer with any lot, and that no compensation would be made in respect to any fault. These pigs were bought and turned with other pigs into the stubble-fields, infecting the healthy ones, whereby some of them died, and the plaintiff failed to sustain his claim for damages: *Ward v. Hobbs*, 3 Q. B. 150; S. C., 26 Week. Rep. 151; reversing the same case, 2 Q. B. 331; 25 Week. Rep. 585; 46 L. J., N. S., 473. So where provisions are packed, inspected, and prepared for exportation as merchandise, there is no implied warranty that they are sound and wholesome: *Winsor v. Lombard*, 35 Mass. 57. In *Wright v. Hart*, 17 Wend. 267, S. C. affirmed in 18 Wend. 449, the article sold was flour, made of grown or sprouted wheat, which rendered it unfit for ordinary bread, and unprofitable made into starch; and it was held that no action would lie

against the vendor on an implied warranty that the article was merchantable, although it was not fit for all the purposes to which it was ordinarily applied. The English cases on the subject of implied warranties were adverted to and commented upon in this case. In selling provisions as articles of merchandise which the buyer does not intend to consume, but to sell again, the doctrine of *caveat emptor* applies. Such sales are usually made in large quantities, and with less opportunity to know the actual condition of the goods than when they are sold by retail. When provisions are not sold for immediate consumption, there is no more reason for implying a warranty of soundness than there is in relation to sales of other articles of merchandise: *Moses v. Mead*, 1 Denio, 388; S. C., 43 Am. Dec. 676. "In a case of provisions," says Shaw, C. J., in *Winsor v. Lombard*, 35 Mass. 62, "it will readily be presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may readily be presumed. But these reasons do not apply to the case of provisions, packed, inspected, and prepared for exportation in large quantities as merchandise. The vendee does not rely upon the supposed skill or actual knowledge of the vendor, but both rely upon the skill and responsibility of the inspector, as verified by the brand, for all qualities which the brand indicates; and for damage which may happen afterwards, and against which, therefore, the brand offers no security, the vendee must secure himself by the terms of the contract; and unless he does so, or unless he is deceived by a false representation of the present and actual condition of the commodity, on which he would have a remedy of a different character, he must be supposed to have been content to take the risk on himself." The rule of *caveat emptor* has been applied to a purchase of provisions as merchandise, to be sold again by the buyer, where he had full opportunity to examine them, and there was no fraud, express warranty, nor representation amounting to a warranty. In such a sale, the buyer is liable for the contract price, though on further subsequent examination a portion of the provisions prove to be unsound and worthless: *Hyland v. Sherman*, 2 E. D. Smith, 234. So where cattle are taken to market by a drover and sold under such circumstances to a butcher, to be slaughtered, no warranty of soundness is implied, and the maxim *caveat emptor* applies: *Goldrich v. Ryan*, 3 Id. 324. The same rule applies to a sale of spoiled and unmerchantable veal by commission merchants to a retail dealer, if sold under the circumstances above named, if the contract is executed, and if the buyer and seller have equal knowledge and means of knowledge of the condition of the meat, which appears to both to be sound at the time, and the buyer makes all the examination he deems necessary before purchasing. In such a case, the seller is not liable to the buyer for damages from latent defects in the meat: *Rinschler v. Jelliffe*, 9 Daly, 469. It is held in Illinois that a rule or custom of the Chicago board of trade, that in cash sales of produce or provisions, giving the buyer the privilege of having them inspected at his own expense, and if he accepts the same without inspection he takes at his own risk as to quality, is not an unreasonable one, in a certain class of cases; as where two persons are each speculating in produce, buying with a view of selling at a profit, or selling to realize profit, or avoid apprehended loss, where the vendor does not seem to have any better means of knowledge of the quality of the article sold than the vendee has. But the Illinois court further holds, that where the

vendor apparently occupies a position where he is reasonably supposed to know the condition and quality of the goods sold, and the vendee might reasonably rely upon such supposition, the rule would be unreasonable, and should not apply. So held where a manufacturer of mess pork sold goods in his line of business as such, and under circumstances where the vendee was justified in believing him to be selling goods of his own manufacture: *Chicago Pkg. & Prov. Co. v. Tilton*, 87 Ill. 555. Where any commodity has been sold, to be resold as an eatable or drinkable, the seller cannot recover if it is utterly uneatable or undrinkable, and so unsalable: *Harman v. Bennett*, 1 F. & F. 400.

b. *There is Implied Warranty in Sale of Provisions for Man's Consumption.* In contracts for the sale of provisions, by dealers and common traders in provisions, there is an implied warranty that they are wholesome where such commodities are sold for immediate consumption: *Ryder v. Neitge*, 21 Minn. 70; *Jones v. Murray*, 3 T. B. Mon. 83; *Hoe v. Sanborn*, 21 N. Y. 561; *Hoover v. Peters*, 18 Mich. 51; *Moses v. Mead*, 1 Denio, 387; S. C., 43 Am. Dec. 676; affirmed in 5 Denio, 617; *Wright v. Hart*, 17 Wend. 267; S. C. affirmed in 18 Wend. 449; *Jones v. George*, 42 Am. Rep. 689; *Humphreys v. Comline*, 8 Blackf. 521. Thus where it was proved that the plaintiff bought of the defendant a heifer for beef, telling the latter that he was going to kill it the next day, and it nowhere appeared that the plaintiff was a butcher, or was buying to sell again, it was held that the fair inference from the testimony was, that the plaintiff bought the heifer for immediate consumption. Further, that if one sells an animal to another, knows that the latter buys it for immediate consumption, intending to slaughter the same very soon, and is aware or has reason to suspect that the animal is in a diseased and unwholesome condition, the disease not being visible externally, he is bound to disclose the fact to the purchaser: *Divine v. McCormick*, 50 Barb. 116. So where defendant has sold the carcass of a hog to one intending to use it as food, or to sell it to others for that purpose, there is an implied warranty that the hog is fit to be used for food; and if the carcass turns out to be that of a boar, especially after the seller has denied that it was that of a boar, the vendor will be liable for the damages sustained. The flesh of a boar is unfit for human food, and is used only for grease or oil: *Burch v. Spencer*, 15 Hun, 504. So the sale of a quarter of beef from an animal slaughtered for fear she would die, the fact being concealed that the animal was diseased, is equivalent to the suggestion of a falsehood that she was sound: *Van Bracklin*, 12 Johns. 468; S. C., 7 Am. Dec. 339. The English law concerning the sale of provisions for food or as merchandise is collected in *Burnby v. Bollett*, 16 Mea. & W. 644; S. C., 11 Jur. 827; 17 L. J., N. S., Exch. 190; but this case will be subsequently referred to under the heads of statutory and criminal liability: See *infra*. The case of *Emmerton v. Mathews*, 17 Hurlst. & N. 585, S. C., 5 L. T., N. S., 681, 31 L. J., N. S., Exch. 139, holds that there is no implied warranty that an article exposed for sale as human food is fit for that purpose, but this case, so far as it contradicts the general and well-sustained rule laid down above, is clearly good not law. The principle that in a sale of provisions for domestic use the vendor is bound to know that they are sound and wholesome, at his peril, is not only salutary, but necessary to the preservation of health and life: *Hoover v. Peters*, 18 Mich. 55; *Moses v. Mead*, 1 Denio, 388; S. C., 43 Am. Dec. 676; *Humphreys v. Comline*, 8 Blackf. 521; *Van Bracklin v. Fonda*, 12 Johns. 468; S. C., 7 Am. Dec. 339. Even in England, subsequent to the decision in *Emmerton v. Mathews*, *supra*, it has been decided that if a man contracts to supply victuals to a ship's crew he impliedly warrants them to be good and wholesome, and fit for the

sustenance of man: *Bigge v. Parkinson*, 7 Hurlst. & N. 954; S. C., 31 L. J., N. S., Exch. 301; S. C., *sub nom. Smith v. Parkinson*, 7 L. T., N. S., 92. But there are English cases which hold that where the purchaser examines and selects the provisions himself, the vendor, if not a professional dealer in meats, victuals, and provisions, is not responsible for their unwholesomeness, if he sold them without fraud, and in ignorance of their being unfit to eat: *Burnby v. Bollett*, 16 Mee. & W. 653; S. C., 17 L. J., N. S., Exch. 190. The offer of provisions to consumers is of itself a warranty that they are fit for consumption as such; but if the seller knows they are unfit, "it is," says Mr. Cooley, "a gross fraud to offer them, for purchasers are not expected to inquire; indeed, the inquiry of a respectable dealer whether he did not know that the provisions he was offering to his consumers were poisonous or otherwise unfit for use might well be taken to be an insult. The sale without disclosing the facts is of itself a fraud, because the offer is of itself a representation of suitability for use:" Cooley on Torts, 480. And these conclusions are well sustained by the cases cited under the general rule above.

c. *Doctrines in Sale of Food for Domestic Animals*.—The doctrines of fraud, implied warranty, and deceit have recently and with entire justice been applied to the sale of food for domestic animals. The case was one of the sale of hay upon which a poisonous fluid had been accidentally spilled. The hay was fed to a cow which was poisoned from eating it. "It is perfectly well settled," says Ames, J., "that there is an implied warranty in regard to manufactured articles purchased for a particular purpose, which is made known at the time of the sale to the vendor, that they are reasonably fit for the use for which they are purchased. It may, perhaps, be more accurate to say that, independently of any express and formal stipulation, the relation of the buyer to the seller may be of such a character as to impose a duty upon the seller differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part of the quality of the thing sold. A grocer, for instance, who sells at retail, may be presumed to have some general notion of the uses which his customers will probably make of the articles which they buy of him. If they purchase flour, or sugar, or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things are at least wholesome and reasonably fit for use; and proof that he knew, at the time of the sale, that they were not wholesome and reasonably fit for use, would be enough to sustain an action against him for deceit, if he had not disclosed the true state of the facts. The buyer has a right to suppose that the thing which he buys under such circumstances is what it appears to be, and such purchases are usually made with a reliance upon the supposed skill or actual knowledge of the vendor. In the case at bar, the plaintiff bought the hay in small quantities, and the defendant must be considered as knowing, generally, the kind of use to which it was to be applied. The act of sale, under such circumstances, was equivalent to an express assurance that the hay was suitable for such use. If he knew that the hay had a defect about it, or had met with an accident that rendered it not only unsuitable for that use, but dangerous or poisonous, it would plainly be a violation of good faith and an illegal act to sell it to the plaintiff without disclosing its condition. Silence in such a case would be deceit:" *French v. Fining*, 102 Mass. 132; S. C., 3 Am. Rep. 440. This seems to be the sound doctrine, although there is contrary authority; and it has been held that, while an implied warranty exists when food is purchased for human consumption, the warranty is confined to such pur-

chases alone, and does not exist where it is bought and used for the feeding of animals alone. Thus bran was bought from a mill as food for cows. By accident, two copper clasps, used about the mill, fell into the bran. These were swallowed by one of the buyer's cows, and caused her death. The presence of the clasps in the bran was not known to the miller, however; and it was held that there was no warranty on which the miller was liable: *Lukens v. Freund*, 27 Kan. 664; S. C., 41 Am. Rep. 429. So in *Jackson v. Harrison*, 2 F. & F. 782, seed-crushers, who sold their refuse oil-cake to graziers, without describing it, or selling it as fit for the food of cattle, nor even knowing that it was bought as such, were held not liable on an implied warranty that it was so. The cake in this case caused the death of animals fed with it. The decision, however, might have been different if the vendor had been a common or professed dealer in manufacturing and selling food for cattle. Here the defendant was not, but sold the cake just as it was, and it was said that it devolved upon the plaintiff to see whether it was fit for feeding his cattle or not. Thus far, it seems to be plain that on a sale of provisions to the consumer there is an implied warranty that they are sound and wholesome; that there is no implied warranty of the soundness of provisions sold unless bought for domestic use; and that the existence of an implied warranty in a sale of food for animals is doubtful.

d. *No Warranty will be Implied unless Seller of Food is Common Dealer; or unless He Exposes Provisions for Sale as Fit for Domestic Use.* This seems to be the inevitable conclusion from the case last cited, and is doubtless the English law upon the point. There are at least cases to support such a doctrine, and such a rule is clearly another exception to the unqualified doctrine of Blackstone laid down above, viz., that in contracts for provisions it is always implied that they are wholesome. So where a person sells provisions, who is not a professed buyer and seller of such commodities, he is not liable unless there is evidence of a warranty or of fraud. Neither is he liable though the provisions were purchased for domestic use, unless they were exposed to sale for that purpose. The frequently cited and leading English case concerning the pig is authority for this. In that case A, a farmer, bought, in the public market of a country town, from B, a butcher keeping a stall there, the carcass of a dead pig, for consumption, and left it hanging up, intending to return after completing other business and take it away. In his absence, C, a farmer, seeing it, and wishing to buy, was referred to A, as the owner, and subsequently, on the same day, bought it of A, the original buyer, without any warranty. It did not appear that any secret defect in it was known to any of the parties. It turned out to be unsound and unfit for human consumption. It was held that no warranty of soundness was implied by law between the farmers A and C: *Burnby v. Bollett*, 16 Mee. & W. 644; S. C., 11 Jur. 827; 17 L. J., N. S., Exch. 190. So a public salesman of meat who sold a carcass of beef to a retail butcher, on commission, and which had been consigned to the salesman by his employers, was held not liable upon an implied warranty, where he had no means of knowing, or reason to suspect, that the beef was unwholesome and unfit for human food, though it was discovered to be so after it was cooked: *Emmerton v. Mathews*, 7 Hurlst. & N. 586; S. C., 5 L. T., N. S., 681; 31 L. J., N. S., Exch. 139; 1 Am. Law Reg., N. S., 231. In this country the same principle has been applied in sales between farmers, commission merchants, etc., and retail dealers in meats: *Howard v. Emerson*, 110 Mass. 320; S. C., 14 Am. Rep. 608; *Goldrich v. Ryan*, 3 E. D. Smith, 324; *Rinschler v. Jelliffe*, 9 Daly, 469. A broader doctrine is found in one case, and a warranty is said

to arise, whether the vendor is a dealer or not, if he knows that the food is purchased for immediate consumption: *Hoover v. Peters*, 18 Mich. 51.

e. *Knowledge of Purpose for Which Food is Bought—Knowledge of Unwholesomeness.*—In sales of provisions for direct consumption as human food, the law, as seen above, presumes that the seller knows that the purchaser intends to use them as such, and raises a warranty of soundness. This rule is said to be applicable not only in a case where the seller knows that the purchaser intends to use the provisions for food, but also where he knows that the purchaser intends to sell them to others to be used as food: *Burch v. Spencer*, 15 Hun, 504. The latter proposition, however, is denied in *Howard v. Emerson*, 110 Mass. 320, S. C., 14 Am. Rep. 608, holding that in the sale of a cow by a farmer to retail butchers the law raises no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use. As to the effect of a salesman's knowledge that provisions are unwholesome and unsound at the time he offers them for sale, the English law appears to be that victualers, brewers, and other common dealers in victuals, who in the course of trade sell provisions unfit for the food of man, are liable civilly to the vendee without any fraud on their part, or warranty of the soundness of the thing sold: *Burnby v. Bollett*, 16 Mee. & W. 653; S. C., 11 Jur. 827; 17 L. J., N. S., Exch. 190; but a private person not following any of these trades, who sells an unwholesome article for food, is not liable except in cases of fraud or where he knows the food to be unsound. Such persons are liable only for defects of which they had, or might have had, knowledge: *Jackson v. Harrison*, 2 F. & F. 782; *Emmerton v. Mathews*, 7 Hurlst. & N. 592; S. C., 5 L. T., N. S., 681; 31 L. J., N. S., Exch. 139; 1 Am. Law Reg., N. S., 231. So here in the sale of provisions for domestic use, the vendor, at his peril, is bound to know that they are sound and wholesome; if they are not so, he is liable to an action on the case, at the suit of the vendee: *Van Bracklin v. Fonda*, 12 Johns. 468; S. C., 7 Am. Dec. 339; *Divine v. McCormick*, 50 Barb. 116; *Burch v. Spencer*, 15 Hun, 504. So where a private person, not following the trade of a common dealer in provisions, sells meat to a retail dealer to be sold again, he is not liable to the buyer for damages arising from latent defects in the meat, where the buyer and seller have equal knowledge and means of knowledge of the condition of the meat, which appears to both to be sound, and the buyer makes all the examination he deems necessary before purchasing: *Rineckler v. Jelffe*, 9 Daly, 469.

f. *Action for Damages.*—Every dealer in provisions offered for sale as food for man, who knowingly sells corrupt and unwholesome food, whereby the plaintiff is injured, is liable to an action on the case for damages caused by the deceit: *Van Bracklin v. Fonda*, 12 Johns. 468; S. C., 7 Am. Dec. 339; *Emmerton v. Brigham*, 10 Mass. 201; S. C., 6 Am. Dec. 109; *Burch v. Spencer*, 15 Hun, 504; *French v. Vining*, 102 Mass. 132; *Mattoon v. Rice*, Id. 236; *Andrew v. Boughey*, 1 Dyer, 75 a, note; *Hoover v. Peters*, 18 Mich. 51; *Divine v. McCormick*, 50 Barb. 116; and such persons are liable for selling unwholesome provisions whether they do so knowingly or not. See cases just cited, and *Burnby v. Bollett*, 16 Mee. & W. 644; S. C., 11 Jur. 827; 17 L. J., N. S., Exch. 190. But a private person not following any of these trades, who sells an unwholesome article as merchandise or to be resold, cannot be made responsible in damages, unless it is shown that he sold the provisions as sound and good food, knowing them at the time to be unsound and unfit for food, or that he was cognizant of latent defects which it was his duty to expose: *Emmerton v. Mathews*, 7 Hurlst. & N. 592; S. C., 5 L. T., N. S., 681; 31 L. J., N.

S., Exch. 139; 1 Am. Law Reg., N. S., 231; *Wright v. Hart*, 18 Wend. 449; *Deas v. Mason*, 4 Conn. 428; S. C., 10 Am. Dec. 162; *Emerson v. Brigham*, 10 Mass. 196; S. C., 6 Am. Dec. 109. Neither is he, without these circumstances, liable to an action for money had and received: *Emmerton v. Mathews*, *supra*. It is true that a purchaser of provisions cannot have a remedy equivalent to that upon an express warranty, unless there has been some artifice. And more especially the action for deceit lies only where there has been an affirmation willfully false, or some artifice is proved or taken to be proved, either directly or by presumption, from the circumstances and nature of the contract, and the situation of the parties: *Emerson v. Brigham*, 10 Mass. 196; S. C., 6 Am. Dec. 109. But the important distinction is here made that artifice is sufficiently proved where a common dealer in articles of food sells provisions as fresh to his customers, which are, in fact, stale and defective, or unwholesome from the state of the thing from which they are made or manufactured. The offer to sell is a representation of soundness, unless the contrary be expressed; and knowledge is presumed from the seller's being engaged in the trade: *Emerson v. Brigham*, *supra*. In accordance with this view, it is held by an ancient authority that if I have an article which is defective, whether victuals or anything else, and knowing it to be defective I sell it as sound, and so represent or affirm, an action for deceit will lie. But although the thing be defective, if the defect is unknown, though I represent or affirm it to be sound, no action lies unless there be a warranty: *Andrew v. Boughey*, Dyer, 75 a, note. But we have seen that the law raises an implied warranty that provisions sold for immediate consumption are sound, though not when they are sold merely as merchandise. In the former case the knowledge of the seller may be proved by the circumstances of the case, and being a question of fact for the jury, will be conclusively established by a verdict against him: *Van Bracklin v. Fonda*, 12 Johns. 468; S. C., 7 Am. Dec. 339. In an action on the case for knowingly selling to the plaintiff unwholesome meat as and for good and wholesome meat, the declaration need not allege that the plaintiff had paid for the meat, nor need it allege any special damage: *Peckham v. Holman*, 11 Pick. 484. An action of contract for the price of a hog was sustained in the following case: A butcher gave notice to a marketman "that the weather was bad for killing, and that he would kill no hogs in that weather unless ordered; but if ordered, would kill and send one to the market the next morning." After such notice the marketman ordered him to kill a good hog that night and deliver it the next morning. It was held that if the butcher executed the order with due care he could recover the value of the pork as if it were sound, although it had spoiled during the night by reason of the weather: *Mattoon v. Rice*, 102 Mass. 236.

g. *Civil Liability of Those to Whom Statute Applies*.—Where there is a statutory liability imposed upon the vendors of unwholesome provisions, the liability of such persons seems to rest upon the statutory responsibility, and not upon an implied warranty: *Goad v. Johnson*, 6 Heisk. 346. Ancient statutes in England have imposed upon "victualers, butchers, and other common dealers in victuals," both a civil and criminal liability, for selling unwholesome food. These statutes and all the old authorities are collected in *Burnby v. Bollett*, 16 Mee. & W. 644; S. C., 11 Jur. 827; 17 L. J., N. S., Exch. 190. It clearly results from this case, and the authorities therein cited, that the responsibility of a victualer, vintner, brewer, butcher, or cook for selling unwholesome food does not arise out of any contract or implied warranty, but is a responsibility imposed by statute, that they shall make

good any damage caused by their sale of unwholesome food. In that case it was said that the cases in the year-books turned on the *scienter* of the seller, or on the peculiar duty of a taverner. Such persons, therefore, are liable under the statute for selling unwholesome provisions without any fraud on their part, or warranty of the soundness of the thing sold; and *Emmerton v. Mathews*, 7 Hurlst. & N. 585; S. C., 5 L. T., N. S., 681; 31 L. J., N. S., Exch. 139; 1 Am. Law Reg. 231, in holding that a private person, not following the trade of a common vendor of food, is not liable for a sale of unwholesome food, made without express warranty and without fraud, and under circumstances from which the law will not imply a warranty, would seem not to contradict the earlier authorities, as explained in *Burnby v. Bollett*, *supra*. *Emmerton v. Mathews*, *supra*, decided that a salesman who sold, in a public market, meat which was afterwards found to be unfit for human food, but which he had no means of knowing or reason to suspect was other than good and wholesome meat, was not liable to an action upon an implied warranty or for money had and received. It will be observed that this transaction between a salesman and a retail butcher takes the case out of the rule which applies to sales for immediate consumption. The correctness of the decision in *Emmerton v. Mathews*, *supra*, has since been confirmed by the common pleas division in the late case of *Smith v. Baker*, 40 L. T., N. S., 261. Under the English law, then, common victualers alone were liable, as upon an implied warranty in this country, but instead of being made liable upon an implied warranty, the responsibility was put upon the ground that they were made liable to punishment for selling corrupt victuals. All the old statutes referred to in *Burnby v. Bollett*, *supra*, and many others of a similar kind, were, however, swept away by the repealing act 7 & 8 Vict., c. 24. Since then acts for preventing the adulteration of articles of food or drink have been passed: See 23 & 24 Vict., c. 84. And an implied warranty has been imposed on the vendor in certain sales by the merchandise marks act, 1862, 25 & 26 Vict., c. 88, secs. 19, 20. A statutory responsibility has also been imposed upon sellers of food by the 38 & 39 Vict., c. 63, sale of food and drugs act, 1875. The sixth section of this act inflicts a penalty upon any person who sells, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance, or quality of the article demanded by such purchaser; and the twenty-seventh section makes it a misdemeanor to give false warranties in writing or to supply false labels on the sale of food or drugs. The following are some of the decisions under this act: *Sandys v. Small*, 3 Q. B. D. 449; *Hoyle v. Hitchman*, 4 Id. 233; *Webb v. Knight*, 26 W. R. 14; *Barnes v. Chipp*, 3 Exch. D. 176; *Rook v. Hopley*, Id. 209; *Francis v. Maas*, 3 Q. B. D. 341. This was amended by the 42 & 43 Vict., c. 30; and for decisions in which the principal act and the amendment thereto were both involved, see *Rouch v. Hall*, 6 Q. B. D. 17; *Horder v. Scott*, 42 L. T., N. S., 660. For decisions under 35 & 36 Vict., adulteration of food, etc., see L. R. 9 C. P. 499; *Roberts v. Egerton*, L. R. 9 Q. B. 494; *Fitzpatrick v. Kelly*, 8 Id. 337. For decision under nuisances removal act, 26 & 27 Vict., c. 117, for removing carcasses deposited in any place for the purpose of being prepared for sale as food for man, see *Young v. Grattridge*, L. R. 4 Q. B. 166. For case regarding the sale in market of an affected animal under the contagious diseases (animals) act, 32 & 33 Vict., c. 70, see *Ward v. Hobbs*, 3 Q. B. 150—same case cited *supra*.

2. CRIMINAL LIABILITY.—a. *At Common Law*.—Selling unwholesome provisions is an offense indictable at common law: *State v. Smith*, 14 Am. Dec. 594. And an offense strongly analogous to this, viz., throwing a carcass into

a well, thereby corrupting the water, is also an indictable offense at common law: *State v. Buckman*, 29 Id. 646. The common-law cases respecting the liability of one for selling unwholesome food are collected in these two cases and their substance shown. To illustrate further, however: A contractor was indicted for selling bad bread to prisoners of war, and the court held that the giving of any person unwholesome victuals not fit for man to eat, *lucri causa*, or from malice or deceit, is an indictable offense: *Treave's Case*, 2 East P. O. 821. So, where lumps of crude alum were mixed with bread sent to a charity school, although the baker gave directions for mixing it up in a manner which would have rendered it harmless: *King v. Dixon*, 3 Man. & Sel. 11; S. C., 4 Camp. 12. The sale of bad food is not only an offense at common law, but knowingly carrying to market meat unfit for human food is likewise an offense: *Regina v. Jarvis*, 3 F. & F. 108; not, however, if the carrier does not know and intend that it is to be sold as human food, or if meat is meant for feeding animals: *Regina v. Crawley*, Id. 109. A meat salesman can be indicted and convicted, at common law, for knowingly exposing meat for sale, in a public market, as fit for human food, which in fact is not so: *Regina v. Stevenson*, Id. 106; but a salesman is not liable, even *civilliter*, either at common law, or under the ancient statutes, or under the Newgate meat-market act, for selling bad meat which he does not kill himself, and which he does not know to be unfit for human food: *Emmerton v. Mathews*, 7 Hurlst. & N. 585; S. C., 5 L. T., N. S., 681; 31 L. J., N. S., Exch. 139; 1 Am. Law Reg. 231; and see *Smith v. Baker*, 40 L. T., N. S., 261. It seems that the market act only gives powers of seizure, and does not otherwise affect the law as to the *actus*: Id.

b. *United States Law*.—It has been held in the United States that to support an indictment for knowingly selling unwholesome provisions, the provisions sold must be in such a state as, if eaten, would, by their noxious, unwholesome, and deleterious qualities, have affected the health of those who were to have consumed them: *State v. Norton*, 2 Ired. 40. There is no doubt that the offense is complete if unwholesome meat is knowingly sold as and for human food, the seller well knowing the same to be diseased, unwholesome, and unfit to be eaten: See principal case; *People v. Parker*, 38 N. Y. 88; *Goodrich v. People*, 19 Id. 574; S. C., 3 Park. Cr. 622; but in the case last cited, it was held that the offense was made out by proof of the sale of the flesh of an animal which the seller knew to have a disease, the nature and tendency of which were to taint and affect the flesh of the animal in any degree, although the taint was imperceptible to the senses, and the eating of the flesh produced no apparent injury. Evidence in such a case on the question as to what defendant knew or believed about the meat is proper, and physicians may properly be examined as to the effect of eating it. In this case the cow sold had a running abscess in the head. An indictment for selling bread mixed with alum is sufficiently certain without showing what the noxious materials were, or that the seller intended to injure the buyer's health: *King v. Dixon*, 3 Man. & Sel. 11. Selling and furnishing unwholesome and poisonous water to an entire community is a nuisance, for which an indictment will lie; but if the indictment does not allege that the defendant, his agents or servants, poisoned the water, or imparted to it its unwholesome quality, it must aver his knowledge of its unwholesome or poisonous quality; and to sustain such an indictment, the prosecution may adduce evidence showing the deleterious effects of the water on particular persons, members of the community, not named in the indictment: *Stein v. State*, 37 Ala. 123. If unwholesome meat is sold generally, as merchandise, without

any knowledge on the part of the seller that it is to be used for human food, the offense is not indictable, because it might be applied in such case to the purpose, for instance, of manure, or as food for wild beasts in a menagerie: *People v. Parker*, 38 N. Y. 88. The law will imply a warranty when provisions are sold for domestic use and immediate consumption, yet when the party comes to declare upon such a contract, he must aver a warranty as in other actions, or set out all the facts from which the law will raise such a contract by implication: *Miller v. Scherder*, 2 Id. 267.

c. *Criminal Statutory Liability*.—In England, victualers, brewers, and other common dealers in victuals, who, in the course of their trade, sell provisions unfit for the food of man, are criminally liable under the statute of 51 Hen. III., Pillory and Tumbrel, and the statute of Edw. I., *De Pistoribus et Braastatoribus et aliis Vitellariis*, if they do so knowingly, and probably if they even do not; but a private person not following any of these trades, who sells an unwholesome article of food not knowing it to be such, is not so responsible: *Burnby v. Bollett*, 16 Mee. & W. 644; S. C., 11 Jur. 827; 17 L. J., N. S., Exch. 190; *Emmerton v. Mathews*, 7 Hurlst. & N. 592; S. C., 5 L. T., N. S., 681; 31 L. J., N. S., Exch. 139; 1 Am. Law Reg., N. S., 231; *Smith v. Baker*, 40 L. T., N. S., 261; *Regina v. Stevenson*, 3 F. & F. 106, note. Among the American statutes on this subject may be mentioned that of Massachusetts: R. S., c. 131, sec. 1. This statute made punishable one who should “knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer.” And under this statute it was adjudged inadequate to charge, completely within the statutory terms, that at a time and place the defendant “did knowingly sell unto one Jeremiah Barker a certain piece of diseased, corrupted, and unwholesome provision, to wit, one hind leg of veal; the said defendant not then and there making known fully to said Barker that the same was diseased, corrupted, and unwholesome.” The defect was that by the interpretation of the statute, the knowledge of the defendant must, to render him guilty, extend, not only to the act of selling, but also to the diseased or otherwise unwholesome condition of the thing sold. By the interpretation of the indictment, the allegation of knowledge went no further than to the act of selling; while it should have been added that the defendant knew the veal to be diseased, corrupted, and unwholesome: *Commonwealth v. Boynton*, 12 Cush. 499. But in an indictment under the Massachusetts statutes of 1866, c. 253, sec. 1, for killing, for the purpose of sale, a calf less than four weeks old, such an act being under the statute punishable by imprisonment, it was held not necessary to allege, nor, in support of the charge, to prove, that the defendant knew that the calf was less than four weeks old; nor that he intended to sell the veal in the commonwealth, or to an inhabitant thereof; nor what use the purchaser intended to make of the veal: *Commonwealth v. Raymond*, 97 Mass. 567. For forms and directions in drawing indictments for selling noxious and adulterated food, and like offenses, see Bishop’s Directions and Forms, secs. 761–772. In the sale of unwholesome food, the common-law offense consists in the unwholesomeness, but statutes in some of the states have made it punishable to sell any sort of adulterated milk: *Bainbridge v. State*, 30 Ohio St. 264; *Phillips v. Meade*, 75 Ill. 334; *Commonwealth v. Flannelly*, 15 Gray, 195; *Commonwealth v. Smith*, 103 Mass. 444. These statutes are within the legislative power: *Commonwealth v. Waite*, 11 Allen, 264; and the same purpose may be accomplished by municipal by-laws: *City of Chicago v. Barte*, 100 Ill. 57; *People v. Mulholland*, 82 N. Y. 324; S. C., 37 Am. Rep. 568. The terms of

these statutes differ, but in the absence of special words in the statute, it is probably the better opinion that it is not an affirmative element in the offense that the seller knew of the adulteration, and it need not be alleged or proved against him: *State v. Smith*, 10 R. I. 258; *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Nichols*, 10 Id. 199; *Commonwealth v. Smith*, 103 Mass. 444; but see *Core v. James*, L. R. 7 Q. B. 135, 138. Some of the statutes, however, require such knowledge, and the indictment under them must aver and the evidence prove it: *Commonwealth v. Flannelly*, 15 Gray, 195; *Phillips v. Meade*, 75 Ill. 334; *Bainbridge v. State*, 30 Ohio St. 264; *Commonwealth v. Smith*, 103 Mass. 444. While it is sometimes held that, where the statute is silent concerning the seller's knowledge, if, however honestly and after whatever precautions, he is misled to believe the milk to be pure, he is punishable should it turn out to be adulterated; yet, by the just doctrine, an unavoidable mistake of the fact, by one whose purpose it is to obey the law, relieves him from legal guilt, the same as from moral, precisely as in other criminal cases. As this note is already long enough, it will be ended by referring simply to cases in which some questions have arisen relating to the indictment and evidence: *Commonwealth v. Farren*, 9 Allen, 489; *Stearns v. Ingraham*, 1 Thomp. & C. 218; *Commonwealth v. Flannelly*, 15 Gray, 195; *Commonwealth v. Nichols*, 10 Allen, 199; *Commonwealth v. O'Donnell*, 1 Id. 593; *Lammond v. Volans*, 14 Hun, 263; *Dilley v. People*, 4 Bradw. 52; *Commonwealth v. Lucomb*, 130 Mass. 42.

SANDERS v. YOUNG.

[1 HEAD, 219.]

ERROR IN STRIKING OUT GOOD PLEA IS CURED if the defendant is afterwards allowed to avail himself fully of all the matters of defense on which he saw fit to rely.

FERRY-MAN IS LIABLE AS COMMON CARRIER, and must have a safe boat, a skillful ferry-man, and sufficient force to manage the boat and care for persons and property received for transportation. He is liable for loss or injury occasioned by neglect of these duties and precautions.

CONSTRUCTION OF STATUTE.—When statute authorizes county court to excuse ferry-man from having hand-rails upon his boat for the greater security of stock, and the county court does so excuse him, his duties and liabilities as a ferry-keeper under the common law are in no way diminished.

THE facts are stated in the opinion.

J. B. Moores, for the plaintiff in error.

S. M. Fite, for the defendant in error.

By Court, **McKINNEY, J.** This action was brought against the plaintiff in error, as keeper of a public ferry on the Cumberland river, for the value of a mule lost by drowning in crossing at said ferry. Verdict and judgment were rendered in favor of the plaintiffs for one hundred and seventy dollars damages. We think there is no material error in the record.

The several pleas of the defendant, which were struck out by order of the court, were all immaterial, except the first, or, at most, amounted only to the general issue. The first plea of the general issue, not guilty, though not altogether unexceptionable in point of form, was, perhaps, good in substance, and not inappropriate to the true *gravamen* of the action as laid in the declaration. But though this plea was improperly struck out, the plaintiff in error cannot, under the circumstances, ask a reversal of the judgment for that cause, inasmuch as under a less formal and less appropriate plea—a sort of plea of *non assumpsit*—he was permitted to bring out and avail himself fully of all the various matters of defense upon which he saw fit to rely. The irregularity complained of, therefore, however subject to criticism, does not constitute error affecting the merits of the cause for which the judgment ought to be reversed.

There is no error to the prejudice of the plaintiff in the instructions of the court. A ferry-man is liable as a common carrier: 2 Kent's Com. 598; Story on Bailments, 506, 507. It avails the plaintiff nothing in this action, that by an order of the county court, pursuant to the act of 1842, c. 134, sec. 3, he was excused from having "hand-rails" fixed upon his ferry-boat for the greater security of "stock." This exemption from the general requirement of the statute does not diminish or in any way affect his duties or liabilities as a ferry-keeper upon the general principles of the common law. Irrespective of the statute of 1842, the keeper of a public ferry is bound to have a boat safe and sufficient for all the uses and purposes incident to his employment. He is likewise bound at all times to have a skillful ferry-man and a sufficient force to manage the boat, and to take proper care of persons and all kind of property received for transportation; and for all loss or injury occasioned by neglect of these duties and precautions he is liable.

Applying these principles to the facts of the present case, the judgment is clearly correct.

Judgment affirmed.

FERRY-MEN ARE COMMON CARRIERS: *May v. Hanson*, 63 Am. Dec. 135; *Richards v. Fuqua's Adm'r*, 64 Id. 121; which cases also show their duties and liabilities.

RIGHTS AND LIABILITIES AT COMMON LAW ARE NOT AFFECTED BY STATUTORY ENACTMENTS, WHEN: *Methodist Church v. Remington*, 26 Am. Dec. 61; *Wetmore v. Tracy*, 28 Id. 525; *Tinsman v. Belvidere Delaware R. R. Co.*, 69 Id. 565.

ERROR IS CURED WHERE PARTY IS AFTERWARD ALLOWED BENEFIT OF WHAT HE CLAIMED: *Mitchell v. State*, 68 Am. Dec. 493; and he cannot complain of error not prejudicial to him: *Baker v. Haldeman*, 69 Id. 430.

THE PRINCIPAL CASE WAS CITED in *East Tenn. Iron Mfg. Co. v. Gaskell*, 2 Lea, 747, to the point that to a declaration on a note against executors seeking to hold them personally liable, pleas which set up defenses to a suit against them in their representative character are immaterial, and may be stricken out on motion, or treated as immaterial on the trial, although issue be joined on them.

NICHOLAS v. WARD.

[1 HEAD, 322.]

VOLUNTARY CONVEYANCE TO CHILD, RELATIVE, OR EVEN TO STRANGER IS GOOD AND VALID, if it be not at the time prejudicial to the rights of any other person, or in execution of any meditated scheme of future fraud or injury to other persons.

VOLUNTARY GIFT OR CONVEYANCE BY PARTY NOT INDEBTED IS VOID, if made with any design of fraud or collusion or injury to other persons in the future.

CONVEYANCE MADE TO DEFRAUD EXISTING CREDITORS IS GENERALLY HELD VOID as to subsequent creditors.

VOLUNTARY CONVEYANCE IS PRESUMED TO BE FRAUDULENT AS TO EXISTING CREDITORS; but as to subsequent creditors there is no such presumption, and fraud in fact must be established.

THE facts are stated in the opinion.

Denton and Colms, for the complainant.

J. W. McHenry, for the defendants.

By Court, **McKINNEY, J.** This was an attachment bill, filed on the sixteenth of April, 1856. The complainant claims to be the creditor of defendant Stephen Ward, who is a non-resident, and seeks satisfaction of his debt of some seventy or eighty dollars, out of a tract of land of about fifty acres, lying in Putnam county. It appears that said land was conveyed on the twenty-fifth of January, 1847, by one Saylor to John D. Ward (son of the defendant Stephen), who was then an infant of two or three years of age. The proof tends to establish that Stephen Ward paid for the land, and procured the conveyance to be made to his son. There are vague statements in the proof that Stephen Ward was indebted to several persons beyond his ability to pay, at the time of the conveyance of the land to his son. These statements, however, go for nothing, as the proof fails to establish the existence of any particular debt at that time. The debts claimed to be due complainant were not in

existence until five years after the conveyance from Saylor to John D. Ward, and were not contracted with complainant, but purchased up by him from others.

If the conveyance from Saylor to John D. Ward be placed upon the same footing of a voluntary conveyance, made by the father directly to his son, it does not by any means follow, as has been assumed, that it is inoperative, by the statute of frauds, against subsequent creditors, merely because it was voluntary. The statute does not discountenance a voluntary conveyance to a child or relative, or even to a stranger, if it be not at the time prejudicial to the rights of any other person, or in execution of any meditated scheme of future fraud or injury to other persons. It is true that although the party may not have been indebted at the time of making the voluntary gift or conveyance, still, if it was made with any design of fraud or collusion or injury to other persons in future, it would be void. It is likewise true, that if the conveyance is intentionally made to defraud existing creditors, it will in general be held void as to subsequent creditors. But if there be no existing creditors to be prejudiced by the conveyance, or if it appear to have been made *bona fide* and under circumstances which clearly repel any presumption of fraudulent intention, it is difficult to perceive upon what sound principle a subsequent creditor can be let in to impeach the voluntary conveyance. As against existing creditors, the principle is obviously just, that a voluntary settlement or conveyance will be presumed fraudulent. But as to subsequent creditors, there is no such presumption, and fraud in fact must be established.

In the present case, notwithstanding the suspicions that may arise out of the transaction, there is not sufficient proof of indebtedness or of intentional fraud to entitle the complainant to relief.

Decree affirmed.

CONVEYANCES MADE TO DEFRAUD CREDITORS OR SUBSEQUENT PURCHASERS ARE NOT VOID, but voidable only at the instance of the party aggrieved. They are good between the parties: See collected cases in note to *Fowler v. Stonewall*, 62 Am. Dec. 505; *Smith v. Grim*, 67 Id. 400, and note 401; *Wood v. Chambers*, 70 Id. 382; *Mills v. Howeth*, Id. 331.

VOLUNTARY CONVEYANCE, WHEN GOOD: See *Bullitt v. Taylor*, 69 Am. Dec. 412, and note 419.

VOLUNTARY CONVEYANCE BY ONE AT TIME INDEBTED SUPPORTS LEGAL PRESUMPTION that it was made in fraud of creditors: *Jessup v. Johnston*, 67 Am. Dec. 243, and note thereto 245.

VOLUNTARY CONVEYANCES, when good against subsequent creditors, and when fraudulent as to them: See *Bullitt v. Taylor*, 69 Am. Dec. 412, and collected cases in note thereto 419; *Ladd v. Wiggin*, Id. 551; *Huggins v. Perrine*, 68 Id. 131.

THE PRINCIPAL CASE WAS CITED in each of the following opinions, and to the point stated: A voluntary settlement by a husband upon his wife, though not void *per se* as to the husband's existing creditors, will yet be presumed fraudulent as to them: *Welcker v. Price*, 2 Lea, 667; *Cheatham v. Hess*, 2 Tenn. Ch. 764; *Perkins v. Perkins*, 1 Id. 546. In fact, any voluntary conveyance made by a person who is at the time heavily indebted, and of such a proportion of his property that it must necessarily operate to delay or defeat his existing creditors, is to be presumed fraudulent as to them. A person must be held to intend the fraud which his acts necessarily produce: *Churchill v. Wells*, 7 Coldw. 370. Where property was conveyed, during war times, by mother to son for fear that it would be confiscated, but upon a secret understanding that it was to be reconveyed when peace should be established, it was held that one who had dealt with the son on the faith of his apparent interest in the property before reconveyance could subject the property to his debts, on the ground that the conveyance from mother to son was valid between the parties, a moral obligation to convey having been recited as a consideration; and that the reconveyance, being made without consideration, was void as to the creditors of the son: *Susong v. Williams*, 1 Heisk. 631. But a voluntary conveyance, made by a person not indebted at the time in favor of his wife or children, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary: *Vance v. Smith*, 2 Id. 351.

KEARLY v. DUNCAN.

[1 HEAD, 397.]

WORDS WHICH AMOUNT TO EXPRESS WARRANTY.—The words “said negroes sound in body and mind,” in a receipt for money paid for negroes sold, amount to an express warranty of soundness of the slaves.

WARRANTY BY COMMISSIONER SELLING UNDER ORDER OF COURT renders him personally liable.

WRITTEN INSTRUMENT IS CONCLUSIVE EVIDENCE OF AGREEMENT between parties thereto, where it was voluntarily made without fraud or mistake; and prior parol declarations cannot be admitted to change the legal liability created by it.

PURCHASE FROM COMMISSIONER SELLING UNDER ORDER OF COURT, and payment of purchase-money to him, form a sufficient consideration to support his express warranty of soundness.

THE facts are stated in the opinion.

Head and Turner, and Fite, for the plaintiff in error.

Guild, Stokes, and Bennett, for the defendant in error.

By Court, MCKINNEY, J. This was an action on the case, grounded on an alleged breach of warranty of the soundness of

certain slaves. The evidence of the warranty, relied on by the plaintiff, is contained in the following instrument:

"Received of M. B. Duncan one thousand four hundred dollars for negro woman Arzilla and two children, sold under decree of court, by William Kearly, commissioner and administrator of Arch'd and Margaret Rutherford, deceased; said negroes sound in body and mind, and slaves for life. This tenth of January, 1857.

"WILLIAM KEARLY, Commissioner."

Judgment was rendered in favor of the plaintiff for one thousand five hundred and thirty dollars, to reverse which an appeal in error has been prosecuted to this court.

No question is made upon the facts. The unsoundness of the slaves at the time of the sale, of a nature and degree to render them of no value, and the defendant's knowledge of such unsoundness, are sufficiently established.

The errors relied upon are supposed to be in the opinions and instructions of the court.

1. The court, in substance, instructed the jury that the words "said negroes sound in body and mind," contained in the foregoing instrument, amounted to a warranty of soundness of the slaves; and that said warranty was personally binding on the defendant.

Both of these instructions, we think, are strictly correct. It was unquestionably the province of the court to interpret the language of the instrument, and also to declare its legal effect. And in doing so, it was proper for the court, upon the facts of this case, to look to the face of the instrument alone. That the words of the instrument contain a clear and explicit warranty is a proposition too plain to admit of discussion; and it is no less clear, upon a familiar, well-established principle, that the defendant is personally liable upon the warranty. Having voluntarily, in the absence of fraud, mistake, or other cause sufficient to avoid his undertaking, stipulated personally for the soundness of the slaves, though not in any wise bound to do so, he cannot escape from the legal liability thereby incurred; neither can he be heard to aver or prove an intention contrary to the plain import of the writing.

2. The court held that parol evidence of statements and declarations made by the defendant, or the crier, during the progress of the sale, or before the written instrument was executed, to the effect that the defendant was acting under the appointment of the court; that he would incur no personal

responsibility in respect to the soundness of the slaves or otherwise; that purchasers must judge for themselves, and buy at their peril; and that shortly before the execution of said instrument, he had refused, when applied to, to make any warranty of soundness of the slaves—was inadmissible for the purpose of contradicting the terms of said instrument, and all such evidence was rejected.

In this there was no error, as was declared in the recent cases of *Bryan v. Hunt*, 4 Sneed, 543 [70 Am. Dec. 262], and *Ellis v. Hamilton*, 4 Id. 512. The conduct of the defendant is certainly rather inexplicable, from all the proof in the record.

Notwithstanding the foregoing declarations offered to be proved, it is shown in the proof that during the progress of the sale, the defendant proposed to warrant the soundness of the slaves if the plaintiff would become the purchaser. But we attach no importance to this fact in the determination of the question. Our decision rests upon the ground that immediately after the sale was over, and on the reception of the purchase-money, the defendant voluntarily and deliberately prepared with his own hand, and delivered to the plaintiff, the foregoing instrument; and that there is not the slightest ground in the proof for any imputation of fraud, mistake, or unfairness in the entire transaction. Such being the state of the case, according to all the authorities the written instrument must be taken to contain conclusive evidence of the final and deliberate intention and agreement of the parties.

It is said the agreement to warrant the soundness of the slaves was voluntary and unsupported by any consideration, and therefore not binding on the defendant. This is a mistaken assumption. The purchase by the plaintiff, and payment of the consideration-money, was a sufficient consideration to support the agreement.

Without noticing other minor objections, we affirm the judgment.

NO PARTICULAR FORM OF WORDS IS NECESSARY TO CONSTITUTE WARRANTY: *Chapman v. Murch*, 10 Am. Dec. 227; *Beeman v. Buck*, 21 Id. 571; *Towell v. Gatewood*, 33 Id. 437; *Kinley v. Fitzpatrick*, 34 Id. 108. But these cases show that the language used must have been made and received as a warranty. For words showing express warranty, see *Osgood v. Lewis*, 18 Id. 317; note to *Towell v. Gatewood*, 33 Id. 441.

WRITTEN AGREEMENT IS CONCLUSIVE EVIDENCE OF CONTRACT entered into by the parties to it: *Bryan v. Hunt*, 70 Am. Dec. 262, and note 264.

PAROL EVIDENCE OF ANY PRIOR OR CONTEMPORANEOUS AGREEMENT IS INADMISSIBLE to contradict or vary a written agreement, though such evi-

dence may be admitted to explain the contract, or for the purposes of identification, etc.: *Rockmore v. Davenport*, 65 Am. Dec. 132, and note 136; *Summerlin v. Hesterly*, Id. 639, and note 641; *Sullivan v. McLennans*, Id. 780, and collected cases in note thereto 786; *Cooper v. Berry*, 68 Id. 468; *Bryan v. Hunt*, 70 Id. 264.

THE PRINCIPAL CASE WAS CITED in *Littlejohn v. Fowler*, 5 Coldw. 292, to the point that the contents of a written contract or agreement cannot be proved by parol, without laying grounds for the admission of such testimony.

LINTZ v. THOMPSON.

[1 HEAD, 456.]

VOLUNTARY PAYMENT OF EXECUTION BY OFFICER HOLDING IT, without transfer of the judgment to him, operates not only as a satisfaction of the execution, but as an extinguishment of the judgment, notwithstanding the officer, by reason of neglect, had rendered himself liable under the statute to a judgment, on motion, for the amount.

LAW IMPLIES TRANSFER OF JUDGMENT TO OFFICER PAYING IT only upon the concurrence of two things: 1. That the liability of the officer in default shall have been fixed by a tribunal of competent jurisdiction; 2. That the judgment shall have been satisfied.

THE facts are stated in the opinion.

Burton, for the plaintiff.

E. Cooper, for the defendant.

By Court, McKINNEY, J. On the fourth of October, 1856, Lintz recovered a judgment against defendant Thompson and another, before a justice of Bedford county, for seventy-six dollars and fifty cents. On the fifteenth of June, 1857, an execution was issued on said judgment and placed in the hands of one J. L. Burt, a constable of said county, for collection. The constable, by reason of neglect to make the money and return the execution in due time, rendered himself liable to a judgment on motion under the statute. And being so liable, without any judgment or proceeding against him to enforce his liability, he voluntarily paid to the plaintiff the full amount of said judgment. There was no transfer of the judgment to the constable, upon his payment of the money; nor was anything done to obviate the legal effect of the payment, as a satisfaction and extinguishment of the judgment.

Afterwards, on the twenty-second of April, 1858, the constable returned said execution "not satisfied," and procured the issuance of an *alias* execution upon the judgment for his own benefit. And, on the petition of the defendant, the execution

was superseded and quashed by the judgment of the circuit court.

This judgment of the circuit court quashing the execution is said to be erroneous. We do not think so. The case falls within the principle of *Harwell v. Worsham*, 2 Humph. 524 [37 Am. Dec. 572], which establishes that if an officer pays off an execution to the judgment creditor, without an assignment or purchase of the judgment, it is an absolute discharge of the execution, and the officer cannot hold the execution as unsatisfied, and enforce it for his own benefit.

And we hold that in the case before us the execution was not only satisfied, but the judgment itself was absolutely extinguished, so that no other execution could be issued thereon.

The argument for the plaintiff implies that the principle of *Harwell v. Worsham*, *supra*, is in opposition to the recent case of *Smith v. Alexander*, 4 Sneed, 482. This is not so. The cases are perfectly consistent with each other. The latter case recognizes the doctrine that if a collecting officer or agent, on the ground of official negligence, has been subjected, by judgment of law, to pay the amount of the debt to the creditor, the legal effect is, that by an implied transfer or assignment the debt passes to the officer or agent, who may enforce it against the original debtor. But it must be observed that to produce this result two things are indispensably necessary: 1. That the liability of the officer in default shall have been fixed by the judgment of a tribunal of competent jurisdiction; and 2. That such judgment shall have been satisfied. It is by force of these two concurring facts that the implied transfer of the debt is effected. It follows, therefore, that a voluntary payment by the officer in default, as in the present instance, will have no such effect. In this view of the case, it does not become necessary to consider the construction and effect of the act of 1850, c. 145.

The distinction in principle between the cases cited will be obvious on a moment's reflection. In the one case the money is advanced voluntarily by the officer upon the execution or judgment, and therefore, in the absence of anything to exclude the inference, the law will conclusively presume that it was paid in satisfaction of the execution or judgment, and will give it that effect. But in the other case the payment is compulsory, and not upon the original execution or judgment, but in satisfaction of the recovery against the officer for his own personal default; consequently, in the latter case the original judgment is left in full force, and both in fact and in law,

remain unsatisfied. In the one case there is a thing *in esse*, capable of being transferred; but in the other case nothing remains to be assigned in any mode.

Judgment affirmed.

EFFECT OF OFFICER'S PAYING OFF EXECUTION HIMSELF without a transfer of the judgment: See *Reed v. Pruyn*, 5 Am. Dec. 287; *Harwell v. Worsham*, 37 Id. 572; *Whittier v. Heminway*, 38 Id. 309; *Morris v. Lake*, 48 Id. 724, and note 727.

IF OFFICER PAYS EXECUTION WHEN NOT COMPELLED TO, by motion of plaintiff under statute, the payment does not vest the execution in him, but discharges it, and it cannot afterwards be enforced unless the execution was assigned to the party making payment, and an agreement made that the payment should not operate as a discharge: *Morris v. Lake*, 48 Am. Dec. 724.

PAYMENT OF JUDGMENT BY SHERIFF in order to exonerate himself from liability for failing to collect the execution does not extinguish the judgment: See note to *Head v. Gervais*, 12 Am. Dec. 582. But that actual payment does extinguish a judgment, see *Fleming v. Beaver*, 19 Id. 629, even though made by the sheriff without knowledge of the defendant in execution: See note to *Morris v. Lake*, 48 Id. 727; *Boren v. McGhee*, 31 Id. 695. But sheriff's payment of judgment rendered against him for neglect to make the money will not operate as a payment of the original judgment unless the defendant in the execution insist upon such payment as a satisfaction, thus recognizing it as a payment made for his benefit and at his request: *Poe v. Dorrah*, 56 Id. 196.

THE PRINCIPAL CASE IS CITED in *Walker v. Howell*, 1 Coldw. 241, to the point that an officer cannot recover upon a forfeited delivery bond unless he shows that he as an officer had been made liable for the judgment, and had actually satisfied it. If he can do this, it may be that, upon an implied transfer of the judgment to him, by operation of law, he can resort to an action on the bond.

WHITSON v. FOWLKES.

[1 HEAD, 533.]

SUBSTITUTION OF ONE BIDDER FOR ANOTHER AT EXECUTION SALE, after the property is struck off, and before delivery, the substitute taking possession of the property and receiving the bill of sale in his own name, places him in the position of a successful bidder, and not as taking from the original bidder; but he takes the property without warranty and with all the risks which devolve upon a purchaser at an execution sale.

PROMISE TO BEAR PART OF EXPENSE OF SUIT, made by one not a party to it, and in no way interested in its result, is without consideration and void.

THE facts are stated in the opinion.

Bateman, for the plaintiff in error.

Campbell and Hubbard, for the defendant in error.

By Court, CARUTHERS, J. At a sale of a negro boy named John, under an execution against Felix G. Studdort, he was struck off to Whitson as the highest bidder, and at the request of Fowlkes, who was present, and a competing bidder, and in a few minutes after the property was struck off, and before the slave was delivered, he was substituted as the purchaser, and the bill of sale made to him. After this, suits were brought by John Studdort, for this and another slave sold at the same time, and bought by Horatio Clogatt, under a claim of title, in the federal court at Nashville. During the pendency of these suits, Fowlkes had a conversation with Whitson, in which he stated to him that such suits had been brought, and that he and Clogatt expected to join in the defense of them, and "thus lighten the expense" to each, "and asked Whitson if he would bear his part of the suit against him, Fowlkes, to which he replied, Certainly, or I reckon so." It appears that after the suit against Clogatt was tried, and gained by the latter, the suit against Fowlkes was dismissed. The lawyers' fees and tavern expenses were paid by Fowlkes, and in this suit for one half of the same he recovered fifty dollars against Whitson upon the above promise. This appeal in error is to reverse that judgment.

The court instructed the jury that if they found the promise, the consideration would be sufficient; because in such a case, upon the facts stated, the transaction would be a sale of the slave by Whitson to Fowlkes, and the law would imply a warranty of title, and his liability for that would constitute a good consideration for a promise to assist in its defense. We cannot concur in this view of his honor, or rather, in his premises. We think the facts proved do not amount to a sale from Whitson to Fowlkes. It was nothing more than an agreement while the matter was in progress, and not consummated, that the latter should take the place of the former as purchaser at the sale, and by paying the bid obtain its benefit by having the title made to himself. The transaction had no other effect than to substitute Fowlkes to the place of Whitson, and so soon as the terms of the sale were complied with by the former, the latter stood as if he had never made the bid. He was bound to the officer, and as to him could only be discharged by the payment of the bid, but that having been done was a complete exoneration of Whitson. The circumstances imposed no obligation upon Whitson as to the title. His substitute stepped into his shoes, not as purchaser from him, but as

the successful bidder at the sale, and consequently took upon himself all the risks which by law devolve upon the purchaser at execution sales. There is no warranty, express or implied; *caveat emptor* is the maxim.

The conversation was very vague and indefinite; it is difficult to make a contract or binding promise out of it; but if it be so construed, upon our view of the transaction it would be void for want of consideration.

The judgment will be reversed.

CAVEAT EMPTOR IS RULE APPLICABLE TO EXECUTION SALES.—At such a sale there is no warranty of title, either express or implied: *Smith v. Painter*, 9 Am. Dec. 344; *Davis v. Murray*, 12 Id. 661; *Murphy v. Higginbottom*, 27 Id. 395; *Henderson v. Overton*, 24 Id. 492; *Danley v. Rector*, 50 Id. 242; with notes to these cases, as well as those to *Jones v. Burr*, 53 Id. 702, and *McGhee v. Ellis*, 14 Id. 131

CRUSE v. McKEE.

[2 HEAD, 1.]

WILL CONSTRUED TO CONFER LIFE ESTATE, WITH POWER OF DISPOSITION.

Where a testator bequeaths negroes to his wife, to be disposed of by her, with their increase, to the whole, or any one or more, of his children, as she may think proper, at her decease, the wife takes an estate for life, with power to dispose of the property to one or more of the children as she chooses; and her power is coupled with an interest as well as a trust.

WHERE DISCRETIONARY POWER IS NOT EXERCISED, the whole of the objects who are within it will take in equal shares. So must it be in the disposition of a part where the power is not exercised as to the part.

TESTATOR'S CHILDREN WILL TAKE IN EQUAL SHARES PROPERTY which has been bequeathed to his wife with a discretionary power of appointment, where she fails to exercise the appointment, or makes an invalid one.

POWER OF APPOINTMENT TO CHILDREN DOES NOT EMBRACE GRANDCHILDREN, and the exercise of it in their favor is void.

APPOINTMENTS OF WIFE IN CONFORMITY WITH POWER CONFERRED UPON HER ARE NOT VOID because others, invalid, are included in her will. Those in accordance with the power will be sustained; others will be rejected.

PROPERTY NOT DISPOSED OF IN CONFORMITY WITH POWER UNDER WILL MUST PASS AS VESTED REMAINDER under the will, and be distributed equally to all the objects of the power, the testator's children in this case, the representatives taking a share of a deceased child, without regard to the property held under the valid appointments of the wife. It is not a case for collation of advancements, as in intestacy.

VALID APPOINTMENT WILL BE MAINTAINED, though embraced in the same deed or will with others not valid.

ONE CLOTHED WITH POWER OF APPOINTMENT MUST EXECUTE IT IN GOOD FAITH for the end and purpose designed.

APPOINTMENT WILL BE DECLARED VOID where one clothed with a discretionary power, in order to secure advantage to the trustee himself, or to a stranger, makes discriminations among a class of the objects of the power. *Quære*: If fraud intervenes in the exercise of a power of appointment, does it vitiate the entire acts of the trustee, or only such appointments as are fraudulent?

THE facts are stated in the opinion.

John M. Bright, for the respondents who contested the appointment.

Kercheval, for the other respondents.

By Court, **CARUTHERS, J.** This bill is filed as administrator with the will annexed of Rebecca Baggerly, deceased, for the construction of her will, upon the interpleading of the parties whose interests conflict. The difficulty arises upon the exercise of a power by the widow, given to her in relation to the disposition of certain slaves in the will of her husband.

David Baggerly, a citizen of North Carolina, made his will in 1816, and the same was admitted to probate by the county court of Iredell in 1819. It contains these two clauses, upon which the difficulty arises:

"To my beloved wife Rebecca, I give and bequeath all the lands owned by me lying on the south side of the Yadkin river, in Iredell county, during her life-time, and also all my household goods and effects of every description, and also my negro women Fanny and Rina, and a negro boy named James."

In a subsequent clause he says: "It is further my will and desire that my negroes, Fanny, Rina, and James, be disposed of by my wife Rebecca, with their increase, to the whole, or any one or more, of my children she may think proper, at her decease."

In March, 1856, she made her will, and died in Lincoln county, Tennessee, to which she had removed many years ago. These slaves, or their increase, were disposed of in her will, unequally, among such of her children as were then living, and to some of the grandchildren. Some were to be sold, and the proceeds to go, partly, to grandchildren.

She had a power of appointment under restrictions; it was to be to any one or more of her children. Her power was coupled with an interest as well as a trust.

A power of appointment to children does not embrace grandchildren, and the exercise of it in their favor is without authority, and void: *Jarnagin v. Conway*, 2 Humph. 50, and

authorities there cited. This is not disputable. But the more difficult question here is, whether that avoids the appointments of her will to children, so as to leave the whole property undisposed of by her, or is it good *pro tanto*? and if so, how shall the balance go? This does not fall under the head of illusory appointments. That only applies to a case where one invested with a power to apportion property amongst a class, with full discretion as to the amount to be given to each, gives to one a merely nominal share. That will be set aside as illusory, as a fraud upon the donor of the power, as he certainly intended by making all the objects of his bounty, or of the power, that each should have a substantial share: 1 Hare & Wallace's Lead. Cas. Eq. 332. But in this case she had full and express power to give all to one, or two, or more, with an unrestricted discretion. It was not to his children as a class, without distinction, but she might exclude one or more, if she chose, entirely. Not so in cases to which illusory appointment applies, though in these cases discriminations may be made, yet not to the entire exclusion of any one, or a nominal share to one.

In this case the widow's estate is for life only by implication with power to control the remainder to a limited extent, and in a certain mode. The limitation was to his children. They, as a class, had a vested joint remainder under the will; but power was given to her to defeat this interest of any one or more by the exercise of the power given, but in case she failed to appoint, or made an invalid appointment, then the property would go to all equally, under his will, at her death.

There is no doubt but that a person having a power must execute it in good faith for the end and purposes designed, or it will be void. In the leading case of *Aleyn v. Belcher*, 1 White & Tudor's Lead. Cas. Eq. 290, this principle is illustrated, and in the notes the cases are collected. In that case the power of appointing was given, but it was exercised in favor of the wife upon an agreement on her part that she should receive only a part as an annuity, and that the residue should be applied to the payment of the husband's debts. This was held to be a fraud upon the power, and set aside, except so far as related to the annuity. A court of equity will guard the exercise of these powers so as to prevent any fraud upon the donor of the power. In all cases where a discretion is given in the selection of the objects amongst a class, good faith must be observed, and if discriminations are made to secure advantage to the trustee himself, or a stranger, his act will be held vicious and corrupt.

If there be a secret understanding that the appointee shall assign a part of the fund to a stranger, or pay the debts of the appointor or loan him the fund, the appointment would thereby be vitiated and declared void: Notes to the same case, p. 295, citing *Murchison v. White*, 8 Ired. L. 55, 59; *Astley v. Milles*, 1 Sim. 343, and other authorities; also *Bostick v. Winton*, 1 Sneed, 538. Any exercise of such a power in fraud of the original intention with which the power was created would in equity render the appointment void.

A question sometimes arises as to the extent the courts will go in setting aside fraudulent appointments; whether to the extent of the fraud, or entirely. But that question does not come up in this case, as there is no pretense that any advantage was received in this case by the appointor, to herself or any one else, to induce the appointment. The objection is that she undertook, by mistake or misconstruction of her authority, to give a part of the property to grandchildren. There was no fraud contemplated by her, nor can it be so considered. The rules in relation to fraudulent appointments do not, then, apply to the case, but it is simply a question of the validity of its exercise, so far as it is in favor of grandchildren.

The result is, that her appointment, so far as it is exercised in favor of her children, is valid, and the appointment to her grandchildren is void.

The slave Tillman, given at valuation in the third clause to her daughter, Mrs. McKee, is not properly disposed of, as the amount of the value is distributed in a manner not authorized by her power. The dispositions in clauses 4, 5, and 7, being to children of the donor, are good; so are the bequests of the eighth clause, as that relates to property not embraced in the trust, that being limited to the slaves.

A valid appointment, though in the same deed or will with others not valid, will be maintained: 2 Sugden on Powers, 87.

The other slaves, not disposed of by the widow under the trust, must be distributed equally among all the objects of the power, under the will of David Baggerly. We have felt strongly inclined to produce equality, by compelling those to account who have received slaves by the valid exercise of the discretionary power confided to the widow, but have been unable to find any principles to authorize it. She had the express power to give the whole to "any one or more," and exclude the others. She could have given all to one. All would have been equal on failure to exert the power, or in case of an invalid

or void exercise of it. The unrestricted power of selection and discrimination intrusted to her enabled her legally to produce any inequality she desired. So far, then, as she has appointed, that must stand, with its advantages to the objects selected. As to that portion of the property she has left untouched by her power, it must pass under the will of the testator as a vested remainder, exempt from the contingent power of appointment given to her over it, to all his children and their representatives, where any are dead. It is not a case for collation of advancements, as in cases of intestacy; but the right is derived from the will. All the children then are embraced, without regard to what any may have received under the exercise of the power, that is, from a different source: Sugden on Powers, 508.

Where a discretionary power is not exercised, the whole of the objects who are within it will take in equal shares: Hill on Trustees, 70-492. So it must be where it is not exercised as to part, in the disposition of that.

The decree of the chancellor will be reversed, and decree here in accordance with this opinion.

GRANDCHILDREN CANNOT TAKE UNDER WILL AS "CHILDREN," WHERE THERE ARE CHILDREN: *Presley v. Davis*, 62 Am. Dec. 396.

DEVISE TO ONE FOR LIFE, AND TO HIS CHILDREN, EFFECT OF: *Rogers v. Rogers*, 20 Am. Dec. 716; *Thompson v. Garwood*, 31 Id. 502; *Carr v. Estill*, 63 Id. 548.

TESTATOR'S CHILDREN TAKE VESTED INTEREST IN ESTATE DEVISED TO WIFE TO BE DIVIDED "amongst my children as she may think best," and on failure of appointment, the children take equally at the wife's death: *Cathey v. Cathey*, 49 Am. Dec. 714, and note thereto 716.

EFFECT OF EXECUTED AND UNEEXECUTED POWERS: See note to *Johnson v. Cushing*, 41 Am. Dec. 704-706; *Cathey v. Cathey*, 49 Id. 714.

EFFECT OF DEFECTIVE EXECUTION OF POWERS: *Mitchell v. Denson*, 65 Am. Dec. 403.

VESTED ESTATE IN REMAINDER IS CREATED, WHEN: See collected cases in note to *Manderson v. Lukens*, 62 Am. Dec. 315.

POWERS COUPLED WITH INTEREST: See note, describing and defining them, showing what are, and when they may be executed, and giving instances of powers not coupled with an interest, to *Cassiday v. McKenzie*, 39 Am. Dec. 82, 83.

POWERS MUST BE EXECUTED IN GOOD FAITH. Courts of equity will aid defective execution of powers, but not the non-execution of them: *Mitchell v. Denson*, 65 Am. Dec. 403. But the presumption that a power of appointment has been legally exercised exists in favor of innocent purchasers or meritorious claimants: *Marshall v. Stephens*, 47 Id. 601.

THE PRINCIPAL CASE WAS CITED in *Cockrill v. Mancy*, 2 Tenn. Ch. 55, to the point that upon the valid execution of a power under a will the appointees take under the original will; and on page 56, that a widow may, in the exer-

cise of the power of appointment under her husband's will, charge the appointees with advancements made to them by her husband or herself, in order to produce inequality in the portions of such devisees. But in the absence of such a power, it is not a case for collation of advancements, as in cases of intestacy: *Id.*

WILLIAMS v. LOVE.

[2 HEAD, 80.]

EQUALITY AMONG PARTNERS—PARTNER'S LIEN UPON PARTNERSHIP LANDS.—

Partners in lands have an equity against each other for the purpose of producing equality among themselves. This equity fastens itself to, and is a lien upon, their respective interests in the partnership lands; and neither partner, nor a creditor of his, nor a purchaser from him with notice, can deprive his copartner of such lien.

PARTNER'S LIEN UPON PARTNERSHIP LANDS MAY BE ENFORCED BY HIS PERSONAL REPRESENTATIVES after his death, where inequality between the partners, or indebtedness from one to the other, arose from transactions occurring in the life-time of such partner; as it is immaterial whether the amount of such inequality or indebtedness was ascertained at the death of the partner in whose favor this inequality existed.

OWNER OF LEGAL TITLE TO PARTNERSHIP LANDS CANNOT BE FORCED TO PART WITH IT until the copartner's debt to him is paid, and he is freed from liability for him. If two persons are joint owners of lands—one having the legal title, the other a mere equity in the land—and the latter is indebted to the former, the one who has the legal title cannot be forced to part with it until his debt is discharged and he is freed from liability for his copartner.

PURCHASER, MORTGAGEE, OR ATTACHING CREDITOR OF EQUITABLE INTEREST IN PARTNERSHIP LANDS must take it incumbered with the equity existing against the person having such equitable interest; for the purchaser of an equitable title must always abide by the case of the person from whom he buys.

PERSONAL REPRESENTATIVE, HEIRS, OR DEVISEES OF ONE HOLDING LEGAL TITLE, AND EQUITABLE LIEN ON PARTNERSHIP LAND for satisfaction of indebtedness to him, may enforce such equitable lien, if the party holding it dies before its enforcement.

EFFECT OF MORTGAGE OF EQUITABLE INTEREST IN PARTNERSHIP LAND BECOMING INDEBTED TO HOLDER OF LEGAL TITLE.—Where the holder of an equitable interest in partnership land mortgages it to a third person, and the mortgagee becomes indebted to the holder of the legal title, and assigns his claim upon the mortgagor, together with his lien, the land becomes subjected to an additional equity against the mortgagee by reason of his indebtedness, and his assignee, occupying the same ground, must yield to the superior equity of the person holding the legal title.

THE facts are stated in the opinion.

William Thompson, for the complainants.

F. B. Fogg, for the defendants.

By Court, WRIGHT, J. On the first of September, 1837, John C. McLemore executed to William M. Gwinn a deed of trust upon the one undivided moiety of two tracts of land entered in the name of Charles J. Love, situated in the county of Dyer, and state of Tennessee.

One of these tracts contained five thousand and the other one thousand seven hundred acres, and the deed of trust recited that the other moiety belonged to Charles J. Love.

On the tenth of November, 1837, this deed of trust was registered in Dyer county, and purports to have been executed to secure pre-existing debts, due from McLemore to Gwinn.

On the twenty-ninth of November, 1847, Gwinn assigned to complainant, William S. Williams, the claim he so held upon McLemore, with the trust, to secure its payment.

These lands had been located by W. B. Jones, who was employed by Charles J. Love and McLemore for that purpose; and by a decree of this court rendered the nineteenth of February, 1846, one Woodfolk, as the assignee of Jones, recovered jointly against Samuel T. Love, as the executor of Charles J. Love, and also against said McLemore, the sum of two thousand and eighty-three dollars and sixty cents, with interest from the first of January, 1846, as compensation to the locator, Jones, for locating said two tracts of land, and for other small amounts against them, and one third of the costs of that suit—the whole of which Charles J. Love's executor paid—McLemore being unable to pay any part of it.

It further appears that Samuel T. Love, as the executor of Charles J. Love, on the fourth of March, 1843, obtained a decree in the chancery court at Franklin, against John C. McLemore, for three thousand eight hundred and sixty-seven dollars, upon which executions have been run, and returned "no property found."

McLemore and Charles J. Love had been partners in the purchase and location of land warrants, and this last recovery grew out of matters pertaining to the partnership.

The amount due Charles J. Love's estate by McLemore, on account of these two recoveries, on the twenty-second of May, 1856, was eight thousand seven hundred and seventy-three dollars and ninety-eight cents, and the same remains unpaid.

Gwinn and Charles J. Love had been partners in the manufacture of iron; and the latter having died in July, 1837, a bill was filed on the first of September of that year by Samuel T. Love, as the executor of Charles J. Love, against Gwinn, for a

settlement of the partnership; and on the thirteenth of June, 1851, a decree was had in his favor against Gwinn for thirty thousand nine hundred and ninety-four dollars, and this also remains unsatisfied.

Charles J. Love, in his life-time, had made a covenant with McLemore to convey him the one undivided half of the one thousand seven hundred acres, and had also made him a transfer of the one undivided half of the five thousand acres, upon a copy of the entry; but it was agreed between them that the grants should issue in Love's name.

The grants did, accordingly, issue to Charles J. Love, and the legal title to said lands stands now in the heirs and devisees of said Charles J. Love.

It is to be inferred from the record in this cause that the two tracts of land aforesaid belonged to the partnership lands of McLemore and Charles J. Love.

On the third of September, 1847, Samuel T. Love, as the executor of Charles J. Love, together with his heirs and devisees, filed a bill against McLemore, seeking to subject his interest in the said two tracts of land to the payment of his half of the Woodfolk decree, and also to the decree of the fourth of March, 1843, charging that they had a lien upon his interest in said lands.

On the twelfth of April, 1849, William S. Williams filed his bill against Charles J. Love's executor, and heirs and devisees, and also against McLemore and Gwinn, upon the mortgage debt assigned to him by Gwinn, claiming priority out of said McLemore's interest in said lands, and asking for an injunction against Charles J. Love's executor, heirs, and devisees, and that the legal title of one half of said lands be divested out of them and sold to pay his debt.

The executor and heirs and devisees of Charles J. Love insist that, before they shall be compelled to part with the legal title to said McLemore's moiety of said lands, the debt due them from him, as well as the debt due from Gwinn, must first be paid.

And the question is, whether their rights and equities are not superior to the equity of Williams.

We think, if it were necessary, it might fairly be deduced from this record that the whole indebtedness to McLemore to Charles J. Love arose out of transactions connected with their partnership in land-warrants and lands, of which these two tracts were a part. If so, Charles J. Love, at his death, for

the purpose of producing equality between them, had an equity against McLemore, which fastened itself upon his interest in these lands, and of which he could not be deprived by McLemore or any creditor of his, or purchaser from him with notice. *A fortiori* would this be so as to McLemore's half of that part of the decree in favor of Woodfolk which was given as compensation for the location of these very lands: *Sweat v. Henson*, 5 Humph. 49; *Gee v. Gee*, 2 Sneed, 395.

And it can make no difference that at Love's death the amount of inequality between them had not been ascertained by a decree; and that the claim of the locator existed in the form of a joint liability which was not satisfied by the heirs and representatives of Charles J. Love until long afterwards.

They nevertheless arose from transactions occurring in the life-time of Love, and the equity existed at that time.

But if we were to assume that the indebtedness to Charles J. Love by McLemore, and his liability for him to Jones or Woodfolk, arose from independent transactions, unconnected with these lands, or with the partnership, he could not have forced him to a conveyance of this half of these lands without paying his indebtedness to him, and freeing him from liability for him.

And the same rights, precisely, exist in favor of the executor, and heirs, and devisees of Charles J. Love. They have the legal title to these lands, and cannot be forced to part with it until the debt due from McLemore is paid.

And the same rule applies to Gwinn. If he had filed the bill, he could not compel a sale by the executor, heirs, and devisees of Love, who had the legal title, until he would do equity by paying not only the debt due from McLemore, but also the debt due from himself to Love's estate, which has been ascertained by the decree aforesaid.

The transactions between Charles J. Love and Gwinn also occurred previous to July, 1837, the time of the death of the former, or the debt arose from transactions occurring prior to that time.

Gwinn, as we shall see, took his mortgage incumbered with the equity existing against McLemore; and in his hands it became subjected to an additional equity against him, because of his indebtedness to Love's estate, and the equity of the estate being at least equal to that of McLemore or Gwinn, and the executor, heirs, and devisees of Love having the legal title in these lands, must, in a court of chancery, prevail: *Turner v.*

Petigrew, 6 Humph. 438, 440; *Sweat v. Henson*, 5 Id. 49, 50; *Alexander v. Wallace*, 10 Yerg. 105.

Williams, in this case, is in no better situation than Gwinn, and Gwinn in no better condition than McLemore.

There is no rule in equity better settled than this, that a purchaser of an equitable title must always abide by the case of the person from whom he buys: *Craig v. Leiper*, 2 Yerg. 193 [24 Am. Dec. 479].

The questions involved in this cause were decided by this court in the late unreported case of *Johnston v. Napier*.

M. C. Napier was, in equity, entitled to certain lands which had been entered and granted in the name of Thompson. The former sold these lands, with others, to E. N. Napier, upon time, and bound himself to make a title. He made an assignment for the benefit of his creditors, by which Johnston, as trustee, became entitled to the debt for the purchase-money of the land due from E. N. Napier. When Thompson was called on by M. C. Napier, or Johnston, his trustee, to convey, so that the title of E. N. Napier might be completed, he refused, unless M. C. Napier would indemnify him for his liabilities as surety and indorser, and also pay him a debt due from M. C. Napier.

This court decided he could not be compelled to convey unless indemnified and his debt paid.

Decree affirmed.

REAL ESTATE PURCHASED WITH PARTNERSHIP FUNDS, AND FOR PARTNERSHIP PURPOSES, is charged with a trust in favor of one partner until the debts obligatory on all are paid, and an accounting between the partners is had: *Dyer v. Clark*, 39 Am. Dec. 697. For other cases bearing more or less upon this point, see *Bardwell v. Perry*, 47 Id. 687; *Miller v. Estill*, 67 Id. 305; *Tillinghast v. Champlin*, Id. 510; *Roberts v. McCarty*, 68 Id. 604; *Coover's Appeal*, 70 Id. 149; *Andrews' Heirs v. Brown*, 56 Id. 252; but this equitable lien is solely under the control of the partners: Note to *Greene v. Greene*, 13 Id. 647; *Bardwell v. Perry*, 47 Id. 687; and if the partnership is dissolved this lien is gone: See case last cited.

ONE MEMBER OF PARTNERSHIP MAY BE INVESTED WITH ENTIRE LEGAL TITLE to real estate purchased with partnership funds; but in equity he will be treated as holding the legal title in trust for the benefit of the partnership: *Moreau v. Safarans*, 67 Am. Dec. 532; note to *Buchan v. Sumner*, 47 Id. 320.

PARTNER'S LIEN ON PARTNERSHIP PROPERTY: See cases collected in notes to *Miller v. Estill*, 67 Am. Dec. 311.

LEGAL TITLE TO PARTNERSHIP REALTY IS LEFT UNDISTURBED by courts of equity, except so far as necessary to protect the equitable rights of the partners: *Long's Heirs v. Waring*, 60 Am. Dec. 533, and note thereto 539.

THE PRINCIPAL CASE WAS CITED in each of the following opinions, and to the point stated: Lands held by deceased husband under a parol purchase

would not make him the "equitable owner;" therefore his widow would not be entitled to dower in such lands: *Lane v. Courtney*, 1 Heisk. 332. But where the vendor, instead of giving a title bond, lends the purchaser money, and retains the legal title to land sold by agreement with the purchaser, as security for the money lent, the parol contract converts the transaction into a mortgage, and the vendor's lien is discharged. So upon the death and insolvency of the purchaser the vendor is entitled, as against the other creditors of the estate, to be paid in full by sale of the land; but as the vendor's lien has been discharged, and the title bond transformed into a mortgage as security for the money lent by the vendor to the purchaser, the widow of the purchaser and mortgagor has a superior right to the vendor and mortgagee to be first endowed out of the land so held: *James v. Fields*, 5 Id. 395. A party holding the legal title will not be forced to part with it until debts due him from the party seeking to obtain the title, and growing out of the subject of the title, are paid or satisfied: *Mitchell v. Brown*, 6 Coldw. 509. A person having the legal title to land may retain it to secure any indebtedness due to him from the equitable owner, or those claiming under him, even if the indebtedness did not grow out of the land: *White v. Blakemore*, 8 Lea, 62. The equity of a joint owner of real or personal property, to be reimbursed the excess of his expenditures in the purchase or improvement of the joint property, or otherwise created, is superior to the rights of a judgment creditor of the co-owner seeking satisfaction out of his interest. And the co-owner can have no part of the proceeds until the debts are paid: *Brown v. Bigley*, 3 Tenn. Ch. 629; *Furman v. McMillian*, 2 Lea, 124. An individual creditor of one of the members of a partnership can, by execution sale and purchase of land bought with partnership funds, only acquire the interest of the debtor after a partnership settlement: *Cheek v. Anderson*, Id. 198. Though the purchaser be indebted to the heirs in an independent transaction not connected with the parcel of realty as to which the title is demanded, yet the heirs have an equity to retain the legal title of such land until the independent debt is paid: *McGoldrick v. McGoldrick*, 2 Tenn. Ch. 543. Upon the principle of the principal case, a court of equity will not compel a surety or indorser to part with funds in his hands in favor of a creditor, unless the creditor first indemnifies him against his liabilities for the debtor as surety and indorser; but the mere liability of an indorser, without any payment of the money, does not enable him, as owner, to sue antecedent parties to the paper, or to have set-offs allowed him against them; nor can he claim to have a trust fund, though created for his indemnity, diverted from the debt, and applied to his use: *Kirkman v. Bank of America*, 2 Coldw. 408. In *Pearl v. Pearl*, 1 Tenn. Ch. 207, the principal case was cited to the first point in the syllabus, *supra*.

LINCOLN v. PURCELL.

[2 HEAD, 143.]

LIEN CREATED BY CONTRACT, AND RESERVED ON FACE OF CONVEYANCE, IS REGARDED AS SPECIFIC LIEN; MORTGAGE AND VENDOR'S LIEN ARE DIFFERENT FROM SPECIFIC LIEN. An express lien created by contract, and reserved on the face of the conveyance, is not, in all respects, equivalent to a mortgage, because the legal estate passes by the conveyance, and vests in the purchaser. It is also of different form, and possesses

greater efficacy than the vendor's lien. The latter, where the legal estate has been conveyed, exists only by implication of law, and is the mere creature of a court of equity. It is in the nature of a trust only, and not a specific lien upon the land conveyed, until a bill has been filed to enforce it. A lien created by contract, and reserved on the face of the conveyance, is regarded as a specific lien, forming an original substantive charge upon the estate thus conveyed, and as affecting all persons who may subsequently come into possession of the estate with notice, either actual or constructive, of its existence.

IMPLIED LIEN OF VENDOR EXISTS, NOT ONLY AGAINST PURCHASER AND HIS HEIRS, but also against all persons claiming under him with notice of it, though they be purchasers for a valuable consideration. This lien, however, does not exist against a *bona fide* purchaser without notice, nor prevail against a creditor who may have acquired a judgment or execution lien upon the property before a bill has been filed by the vendor to enforce his lien.

SPECIFIC LIEN, OR LIEN CREATED BY CONTRACT, WILL BE OPERATIVE AGAINST CREDITORS, *bona fide* purchasers, and all other persons, without regard to actual notice, where the conveyance reserving the lien has been properly recorded.

PRESUMPTION OF LAW IS THAT PURCHASER OF LAND UPON WHICH SPECIFIC LIEN is reserved holds under and consistent with the lien until the contrary is shown by him.

STATUTE OF LIMITATIONS WILL NOT COMMENCE TO RUN AGAINST SPECIFIC LIEN until the purchaser of the land upon which the lien is reserved disclaims the lien, and assumes to hold adversely to it, with the knowledge of the party having such lien.

SEVEN LAPSE OF SEVEN YEARS BEFORE FILING BILL TO ENFORCE LIENS FOR PAYMENT OF MONEY DOES NOT, under the statutes of Tennessee, create a bar. Where the question concerns the character of defendant's possession, such possession must, in legal contemplation, be adverse; that is, a cause of action must have existed for the full period of seven years before suit brought, which might have been asserted at any time within that period, in order to create a bar.

NOTE PAYABLE IN STONE-WORK, TO BE DONE AT ANY TIME CALLED FOR, cannot be sued on without a previous request to do the work.

STATUTE OF LIMITATIONS WILL NOT BEGIN TO RUN AGAINST NOTE PAYABLE IN STONE-WORK, to be done at any time called for, until such request is made.

RELEASE BY NAKED TRUSTEE OF LIEN WHICH HE HOLDS FOR ANOTHER, to a person having knowledge of the character of the claim, is a nullity.

LIABILITY OF TRUSTEE—ACKNOWLEDGMENT OF RECEIPT OF MONEY AS ESTOPPEL.—Where a naked trustee executes a release under seal of a lien for the payment of money, in which he acknowledges the receipt of the money, he holds the money in trust and is liable for the same. And his acknowledgment estops him, both at law and in equity, from denying the fact of receiving the money.

DISMISSAL OF BILL IN EQUITY ON DEMURRER.—EVERY REASONABLE PRESUMPTION IS TO BE MADE IN FAVOR OF BILL IN EQUITY, rather than against it. It is only when it clearly appears from the face of the bill that the equity of complainant is barred that the bill will be dismissed on demurrer for that cause.

THE facts are stated in the opinion.

Houston, for the complainant.

Ewing and Cooper, for the defendants.

By Court, McKINNEY, J. The complainant's bill was dismissed on demurrer.

The bill seeks to subject a lot in the town of Nashville, to the satisfaction of a balance of unpaid purchase-money, by force of an express lien reserved upon the face of the conveyance.

It appears, from the allegations of the bill, that on the first day of December, 1848, the defendant Kirkman sold and conveyed the lot in question to the defendant Purcell at the price of one thousand five hundred dollars. At the time of said sale, Kirkman, the vendor, was indebted to the complainant; and it was mutually agreed between Kirkman, complainant, and Purcell that the latter, in part discharge of the purchase-money of the lot due to Kirkman, should assume and become responsible for the debt due from Kirkman to complainant. And, in pursuance of this agreement, Purcell executed two notes, one for five hundred and twenty-five dollars, and the other for three hundred and twenty-five dollars, "payable in stone-work, to be done at any time called for, after the first of July, 1849." By this arrangement, and the payment of six hundred and fifty dollars in hand by Purcell to Kirkman, the purchase-money of said lot was fully paid to Kirkman, and the indebtedness of the latter to complainant was extinguished. The deed of conveyance from Kirkman to Purcell, which was executed at the time of the contract, recites the execution of said two notes by Purcell to complainant, in part discharge of the purchase-money of the lot; and expressly provides that the sums of money specified in said notes "shall be and remain a lien upon said lot or parcel of land until said sums shall have been fully satisfied, discharged, and paid; and the said William Purcell, upon the payment of said notes, is to have and to hold the aforesaid lot or parcel of land," etc. This deed appears not to have been proved or registered until January, 1852, which was after the sale and conveyance to Cheatham, hereafter to be noticed.

It further appears from the bill, that on the nineteenth of January, 1850, said lot was sold at execution sale as the property of said Purcell, and was purchased by one Northrop. The sheriff's deed to Northrop, in describing the lot, refers to it as "being the same conveyed by John Kirkman to the said William Purcell, by deed (unregistered), on the first day of

December, 1843. On the fourteenth of January, 1841, Northrop sold and conveyed said lot to F. R. Cheatham, and in his deed of conveyance he covenants, amongst other things, that said lot "is unincumbered, with the exception of the balance of the purchase-money due from one William Purcell, on the purchase of said lot of ground by said Purcell from John Kirkman, on the first day of December, 1848." And in the covenant of warranty he warrants "against the lawful claim of all persons, except such as may claim by virtue of the lien of said John Kirkman on said lot of ground, for the unpaid purchase-money due from the said William Purcell on his purchase aforesaid from Kirkman."

The bill exhibits a copy of an instrument executed by John Kirkman to Cheatham, on the seventeenth of August, 1852, in which the former acknowledges the payment to him, by Cheatham, of the balance of the purchase-money due on the two before-mentioned notes, executed by Purcell to complainant, and in consideration thereof he relinquishes to Cheatham all his interest in said lot.

The bill charges that, in fact, Cheatham paid nothing to Kirkham for said release, and denies that Kirkham had any interest in the notes, or in the lien reserved to secure their payment, or that he had any power to release or discharge said lien. It is further charged, in substance, that both Northrop and Cheatham purchased with full knowledge of the fact that a portion of the purchase-money of the lot remained due to complainant, and also with knowledge of the existence of the lien, to secure the payment thereof; and that they respectively held said lot in subservience to and consistently with the right of the complainant, and not adversely thereto; and that in the summer of 1857 Cheatham had promised to pay complainant the remainder of such purchase-money.

It is further alleged that the note for three hundred and twenty-five dollars still remains unpaid; and complainant states that "he demanded payment of said note long since, and payment was refused."

The bill seeks to subject said lot to the satisfaction of the amount of said note by enforcing the lien, which, it is alleged, was reserved for the sole benefit of the complainant. Purcell, Cheatham, and Kirkman are made defendants to the bill. The demurrer to the bill is filed on behalf alone of Cheatham.

Taking the allegations of the bill to be true, for the present, we think the chancellor erred in allowing the demurrer.

The pretended release of Kirkman might be left out of view, as entitled to no consideration in the determination of the main question intended to be raised by the demurrer. Upon the facts charged in the bill, the release is a mere nullity. Kirkman held the lien as a naked trustee for the complainant. No lien could possibly have existed in his own favor, for the simple reason that, by the arrangement stated in the bill, his claim for the purchase-money of the lot was fully satisfied and extinguished at the time of the sale. And Cheatham, as is substantially charged, having knowledge of the facts, cannot avail himself of the release for any purpose. How it might be if Cheatham occupied the footing of a *bona fide* purchaser without notice need not be stated. It is clear, however, that Kirkman is a proper party defendant, either for the purpose of having the release annulled, or for the purpose of having a decree against him for the amount of the unpaid purchase-money, which, by his deed, he acknowledges the reception of from Cheatham. For, although he had no right to receive the money, yet, having done so, he must be treated as holding it in trust for complainant. And his acknowledgment being under seal would be an estoppel upon him, at law, to deny the fact of having received the money; and he will be alike precluded in equity, for he cannot, in the latter forum, be heard to allege that he made the release without consideration with a view to cut off the lien; for this would have been, on his part, a palpable fraud upon the rights of the complainant, which he will not be heard to insist upon in exoneration of his liability.

But the chancellor allowed the demurrer, as is stated in the argument, on the ground that the complainant's equity was barred by the statute of limitations. This conclusion is erroneous, we think, for several reasons.

That it was competent to the parties, by mutual agreement, to create the lien declared in the deed from Kirkman to Purcell, for the benefit of the complainant, admits of no doubt upon general principles of law. But the exact nature and legal effect of a lien thus created seems not to be well defined in any of the books to which we have had access. It certainly is not, in all respects, equivalent to a mortgage, because the legal estate passes by the conveyance and vests in the purchaser, notwithstanding the lien reserved in the deed.

And yet it must be regarded as in some respects different from, and as possessing greater efficacy than, the vendor's lien, properly so called. The latter, where the legal estate has been conveyed to the vendee, is the mere creature of a court of

equity. It exists only by implication of law, and is in the nature of a trust only, and not a specific lien upon the land conveyed, until a bill has been filed to enforce it: 10 Hun, 371.

But an express lien, created by contract and reserved on the face of the conveyance, though not a mortgage, must at least be regarded as a specific lien, forming an original substantive charge upon the estate thus conveyed; and as affecting all persons who may subsequently come into possession of the estate with notice, either actual or constructive, of its existence. This must necessarily be so; for even the implied lien of the vendor exists, not only against the purchaser and his heirs, but also against all persons claiming under him, with notice of it, though they be purchasers for a valuable consideration.

But this implied lien does not exist against a *bona fide* purchaser without notice; neither will it be allowed to prevail against a creditor who may have acquired a judgment or execution lien upon the property before a bill has been filed by the vendor to enforce his lien: 10 Hun, 371, 376. But not so of the lien created by contract, as in the present case. If the conveyance reserving the lien has been duly registered, such lien will be operative against creditors, *bona fide* purchasers, and all other persons, without regard to actual notice.

It is true, in the present case, that the deed from Kirkman to Purcell, reserving the lien, was not registered until after the sale by Northrop to Cheatham. But this is of no consequence in this particular case, because the deed from Northrop to Cheatham expressly recognizes the existence of the lien declared in Kirkman's deed.

If this view of the nature and effect of the lien in question be correct, it certainly does not create between the parties a relation similar to that of a mortgage, as regards the application of the statute of limitations. The relation of the purchaser is more analogous to that of a trustee, by express contract, who may disclaim the trust; and after such disclaimer, and a knowledge thereof brought home to the *cestui que trust*, may claim and hold adversely to him. This is putting the case in the most favorable point of view for the defendant Cheatham. But this will not avail him, as the presumption of law is that he is holding under and consistently with the trust, until the contrary is affirmatively shown by him. Upon this presumption alone the complainant might have safely rested, in answer to the demurrer, without the aid of the affirmative allegation in the bill that the defendant had held, and was holding, in subordination to his lien.

It is altogether a mistaken conclusion that, under the second section of the act of 1819, the complainant's equity is barred by the mere lapse of seven years before filing his bill, irrespective of the character of defendant's possession. To create a bar under that section, the possession must be in legal contemplation adverse. Such has been the uniform course of decision since the case of *Dyche v. Gass*, 3 Yerg. 397. And the case relied on, *Ray v. Goodman*, 1 Sneed, 586, when carefully examined, will be found to be in accordance with previous adjudications upon the statute.

But again: the case of *Ray v. Goodman*, *supra*, settles that the purchase-money must have been due seven years, before the filing of the bill, to enforce the payment thereof by a sale of the land.

In other words, a cause of action must have existed for the full period of seven years before suit brought, which might have been asserted at any time within that period in order to create a bar. This cannot be predicated of the case under consideration, from the face of the bill.

The notes were "payable in stone-work, to be done at any time called for after the first of July, 1849." We take it to be too clear to require either authority or argument that no action could have been maintained on these notes without a previous request to do the work stipulated to be done. Until such demand or request made and refused, there was no default or breach of contract on the part of the maker of the notes; and consequently no right or cause of action on the part of the complainant. The principle that in contracts for the payment of money on demand the bringing suit is all the demand required, has no application to a case like the present.

From the statement in the bill that payment was demanded "long since," and refused, it cannot be inferred that it was demanded more than seven years before suit. This would be to reverse the rule that upon a demurrer every reasonable presumption is to be made in favor of rather than against the bill. It is only in cases where it clearly appears, from the face of the bill, that the complainant's equity is barred, that the bill will be dismissed upon demurrer for that cause.

Decree reversed and cause remanded.

PARTY WILL BE ESTOPPED FROM DENYING HIS OWN ACTS AND ADMISSIONS, WHEN: *Welland Canal Co. v. Hathaway*, 24 Am. Dec. 51, and note thereto 58; *Dickerson v. Board of Comm'rs of Ripland Co.*, 63 Id. 373; *Mitchell v. Reed*, 70 Id. 647, and note 650; *Hardy v. Hunt*, Id. 787.

PRIORITY OF SPECIFIC LIEN: *Ex'rs of Lamar v. Simpson*, 42 Am. Dec. 345.

PRIORITY OF VENDOR'S LIEN OVER MORTGAGE AND OTHER LIENS: See note to *Dunlop's Adm'r v. Wright*, 62 Am. Dec. 511. As to nature of vendor's lien and whom it affects, see *Clover v. Rawlings*, 47 Id. 106, and note 111; *Manly v. Slason*, 52 Id. 60, and note 66. Vendor's lien differs from an equitable mortgage; the latter being founded upon an implied contract, the former not: *Wellborn v. Williams*, Id. 427. But vendor's position is analogous to that of the mortgagee, where he has not conveyed the title to the land sold: *Salmon v. Hoffman*, 56 Id. 322.

MORTGAGE PASSES LEGAL ESTATE: *Jamieson v. Bruce*, 26 Am. Dec. 557.

WHETHER DEMAND IS NECESSARY ON PROMISSORY NOTE NOT NEGOTIABLE, see *Fairchild v. Ogdensburgh etc. R. R. Co.*, 69 Am. Dec. 606, and note 606.

LIABILITY OF ONE WHO TRANSFORMS HIMSELF INTO TRUSTEE: *Fancy v. Cochran*, 37 Am. Dec. 450, and note 454; *Stockard v. Stockard's Adm'r*, 46 Id. 79.

STATUTE OF LIMITATIONS BEGINS TO RUN WHEN CAUSE OF ACTION ACCRUES: *Fee v. Fee*, 36 Am. Dec. 103, and note 107; *Hamilton v. Hamilton's Ex'rs*, 55 Id. 585.

THE PRINCIPAL CASE WAS CITED in each of the following decisions and to the point mentioned: A substantive and valid lien on land, fixed during the life-time of a deceased insolvent, is capable of being enforced in a court of equity, and may be asserted after the death of such insolvent. And it is immaterial how such lien was created, so it is a fixed, subsisting, and valid charge upon the estate. Neither does it matter that it might have been defeated by the superior diligence of other creditors: *Kinsey v. McDearmon*, 5 Coldw. 396. When the legal title has been conveyed by the vendor by a deed of conveyance, his lien does not pass to the assignee of the vendee's obligation for purchase-money; but when he retains the legal title, and executes a title bond or covenant merely to convey, he holds the legal title as security for the payment of the purchase-money, in analogy to that of a mortgagee; and his assignment of the vendee's note carries with it the security: *Tharpe v. Dunlop*, 4 Heisk. 682. Every reasonable presumption is to be made in favor of rather than against a bill in chancery, on a motion to dismiss: *Kerr v. Kerr*, 3 Lea, 237.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

WHITE v. PARISH.

[20 TEXAS, 682.]

UPON VOLUNTARY DISSOLUTION OF PARTNERSHIP, it is competent for the partners to agree that the joint property shall belong to one of them; and if this agreement be *bona fide*, and for a valuable consideration, it will transfer the whole property to such partner free from the claims of the partnership creditors.

PARTNERSHIP CREDITORS HAVE NO EQUITY, STRICTLY SPEAKING, AGAINST PARTNERSHIP EFFECTS, nor have they a lien on the partnership effects for their debts. All they can do is to prosecute their claims to judgments against the partners, and procure executions to be issued thereupon, to be levied upon the partnership effects, upon the separate effects of each partner, or upon both.

WHERE ONE PARTNER SELLS HIS INTEREST IN PARTNERSHIP TO HIS COPARTNER, upon consideration that the latter pay all the partnership debts, and upon other consideration, such property becomes the separate property of the copartner. Upon his death, it goes to his administrator, and the seller cannot claim it as surviving partner, to be used in paying partnership debts which he was forced to pay. His remedy is against his deceased partner's estate under the agreement.

PLAINTIFF in this case in his petition alleged that at a certain time he and one Southern were copartners; that afterwards they agreed that Southern should settle up the affairs of the partnership; that he agreed to pay all the debts of the firm and give plaintiff four hundred dollars for his share in the business; that Southern died shortly afterwards without having completed this agreement, and that defendant was appointed his administrator; that defendant, Parish, as such administrator, claimed the right to settle the affairs of the firm of White & Southern, under the above contract, and re-

sisted plaintiff's right to settle its business, as surviving partner; that Parish claims the property of said late firm as the separate property of deceased, and employs it as such, and neglects and refuses to pay the partnership debts of said firm, claiming that there are no assets in his hands for that purpose; that in consequence of such neglect of defendant to pay such debts, plaintiff has been vexed and annoyed by a great number of suits by the creditors of said firm, and has been compelled to pay on account thereof a large amount of money, and that he is still liable to other creditors. Prayer, etc. Defendant demurred to this petition; plaintiff amended, and defendant's demurrer to the amended petition was overruled, and an auditor appointed, whose report it is here unnecessary to give. The court instructed the jury, at defendant's request, that if they believed from the evidence that plaintiff sold his interest in the partnership to Southern, in his lifetime, they must find for defendant, and they so found. Plaintiff's motion for a new trial was overruled, and he appealed.

White, for himself.

Cunningham and Holt, for the appellee.

By Court, WHEELER, J. The petition alleges, in effect, and the evidence establishes indisputably, that the plaintiff, after the dissolution of the partnership between himself and Southern, sold to the latter his interest in the partnership effects. Those effects thereby became the individual property of Southern; and upon his decease, they were assets in the hands of his administrator. Neither the plaintiff nor the creditors of the firm retained any interest in or lien upon them as partnership effects. The interest of the plaintiff was extinguished by his transfer of that interest to his copartner; and the effects becoming thereby the individual property of the latter, they were liable to the same disposition, subject to like charges as his other individual property. Upon the voluntary dissolution of a partnership, it is competent for the partners to agree that the joint property of the partnership shall belong to one of them; and if that agreement be *bona fide*, and for a valuable consideration, it will transfer the whole property to such partner free from the claims of the joint creditors. While the partnership is solvent and going on, it is well settled the creditors have no equity, strictly speaking, against the partnership effects; neither have they any lien on the partnership effects for their debts. All that they can or may do is to proceed by an action at law

for their debts, against the partners; and having obtained judgment therein, they may cause the execution issuing upon that judgment to be levied upon the partnership effects, or upon the separate effects of each partner, or upon both. There being, then, no lien and no equity in favor of the creditors against the partnership effects until such execution is levied upon them, it follows that those effects are susceptible of being legally transferred *bona fide*, for a valuable consideration, to any person whatsoever; and as well to the other partners as to mere strangers: Story on Partnership, sec. 858; *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Id. 3. It is manifest, therefore, from the plaintiff's own averments, that he had no right of action to subject the property to the payment of the partnership debts. It was rightly treated by the defendant as the individual property of the deceased partner, and subject to administration as such. If the plaintiff was compelled to pay the debts of the firm, he had his recourse, under his agreement with his copartner, against the estate of the latter. But he manifestly had no right of action against the defendant personally. There is, therefore, no error in the judgment, and it is affirmed.

Judgment affirmed.

UPON DISSOLUTION OF PARTNERSHIP, if the retiring partner *bona fide* assigns all his interest in the stock and effects to the remaining partner, it thereby becomes the separate property of the latter, and will be distributed accordingly, even though the remaining partner afterwards becomes insolvent: *Upson v. Arnold*, 63 Am. Dec. 302. Sale, or any contract having effect of sale, by one partner to his copartners, will divest all liens he had upon the partnership effects: *Miller v. Estill*, 67 Id. 305. Where one partner takes partnership property on consideration that he will pay the debts of the partnership, the retiring partner's lien upon the partnership effects is gone; though if the agreement be to take the partnership property and pay the partnership debts therewith, a court of equity would perhaps enforce a proper application of the assets of the firm in behalf of the retiring partner: *Id.*

RIGHTS OF PARTNERSHIP CREDITORS.—Creditors of partnership have no lien on partnership property, and can invoke the rule that the partnership property shall be primarily liable only through the right of partners to have joint property applied to pay joint debts: *Miller v. Estill*, 67 Am. Dec. 305, and note. The equities of partnership creditors are only to be worked out through the equities of the partners themselves, each of whom has a right, while he exercises dominion over the property, to insist on its application to partnership claims, before it be appropriated to the individual debts of the several partners. This right may be waived by the partner's disposing of all his interest in the property: *Cocover's Appeal*, 70 Id. 149, and note.

WALKER v. EMERSON.

[20 TEXAS, 704.]

WHERE JUDSON'S DOCKET IS SHOWN TO BE LOST, and an execution is shown to have issued upon a judgment alleged to have been entered in such docket, and a purchaser of real estate at a sale thereunder is shown to have occupied the land nearly ten years, and not to have been disturbed by the execution debtor, it is a natural presumption, not at all remote, that such a judgment as that recited in the execution really did exist, and it should be left to the jury to find whether it did or not.

DEFENDANT HAS RIGHT TO FORTIFY HIS TITLE AND CURE DEFECTS THEREIN by any releases or conveyances which he can obtain at any time before trial of an action of trespass to try titles.

WHERE ONE IS IN POSSESSION OF REAL ESTATE UNDER BOND FOR TITLE, and has given a note for the purchase-price, which he fails to pay, the obligor may either sue on the note and subject the land and other property to its payment, or he could eject the possessor from the land, unless the latter should bring the money into court and claim a specific performance of the agreement, he not having waived it otherwise than by failure in point of time of payment.

LACHES OF BOTH PARTIES TO AGREEMENT may be so great that a court of equity will relieve neither one of them.

FAILURE OF OBLIGEE IN BOND FOR TITLE TO PAY PURCHASE-PRICE AGREED does not absolutely and of itself put an end to the contract.

WHETHER OR NOT NOTE HAS BEEN PAID IS QUESTION for the jury, and lapse of time so long as fourteen years is a circumstance which should be left to them in determining this question. Its production by the payee after this lapse of time does not rebut any presumptions arising from this circumstance.

APPEAL from Colorado county. The opinion states the facts.

Robson, for the appellant.

Munger and Webb, for the appellee.

By Court, ROBERTS, J. This suit of trespass to try title was instituted in 1856. The plaintiff, Emerson, claimed the land by regular chain of title down to himself. Defendant, Walker, claimed the same under a bond for title from Emerson to Izard, executed in 1841; a sale of it as Izard's property in 1844, under execution; and other conveyances down to Walker. It was shown that Izard went into possession and made improvements on the land upon making the purchase; and that it has generally been occupied, though perhaps not constantly, by those holding under Izard's bond, and never in the possession of Emerson up to the time of the commencement of the action. Izard's bond shows that a part of the purchase-money was paid, and that a part remained unpaid at the time of the purchase, to wit, a note of one hundred and sixty-five dollars, payable in twelve months

from the twenty-eighth of September, 1841. Upon the trial, Emerson produced this note and gave it in evidence. The execution under which the land was sold recited a judgment against Izard by a justice of the peace; but the docket kept by said justice could not be found, after diligent search, and therefore the judgment could not be produced and given in evidence. To obviate this difficulty in the title, Izard executed to Walker a deed of release to the land in October, 1856, a few days before the trial, and which was offered in evidence by Walker, and upon objection by Emerson it was excluded by the court.

The court charged the jury: 1. "That to make out title under a sale by virtue of an execution, both the judgment and the execution must be in evidence, and the executions are no evidence of the existence of a judgment; and unless the judgment by virtue of which the executions issued is shown in evidence, the executions and the sheriff's deed amount to nothing as links in a chain of title."

This charge is correct as a general rule, and particularly with reference to judgments in a court of record. But with reference to the facts of this case, it was erroneous in this, that it precluded the jury from inferring the existence of a justice's judgment, shown by several executions to have been rendered over ten years before the trial; it being shown that the justice's docket had been lost, after most diligent search, and it being shown that Walker had put tenants in possession and otherwise occupied, used, and claimed the land under this execution sale for nearly ten years, Izard setting up no claim thereto in the mean time. Under these circumstances, it was a natural presumption, not at all remote, that such a judgment as that recited in the execution really did exist, and therefore it should have been left to the jury as a fact to be determined by them whether it did or not: 1 Greenl. Ev., secs. 46-48.

In this connection, it may be remarked that it is not perceived upon what ground the court rejected the deed from Izard to Walker, which was evidently designed to cure this apparent defect in his title. No ground of objection is assigned, nor does any appear. Under a general plea of not guilty, as pleaded in this case, it would seem reasonable that the defendant would have the right to fortify and cure the defects of the title under which he held when sued, by any releases and conveyances which he could obtain at any time before the trial.

Another charge given by the court was: 2. "Where a party receives a bond for title, conditioned, that he shall pay money

at a particular time, he has no title until he pays the money; and if he has paid a part of the purchase-money in advance, and fails to pay the balance according to the stipulations of the bond, he forfeits what has been already paid."

The jury would most reasonably understand this charge to mean that the failure of Izard to pay the purchase-money when it became due, of itself put an end to his right, and that thenceforward he had no sort of right that he could transmit by sale. Indeed, another part of the charge shows that this was the view taken by the court below. The true position on that subject is, that the failure to pay the purchase-money when due gave Emerson the alternative option to sue on the note and subject the land and other property to its payment, or to bring a suit for the land, by which he could have ejected Izard from it, unless, perhaps, Izard should bring the money into court, and claim a specific performance of the contract, not having repudiated it otherwise than by failure in point of time of payment: *Estes v. Browning*, 11 Tex. 246 [60 Am. Dec. 238]; *Hill v. Still*, 19 Id. 76; 1 Story's Eq. Jur., sec. 776. The failure to pay the purchase-money did not of itself annul the contract; but it gave Emerson, with certain equitable contingencies, the right to do so. He could waive this right, and let the contract stand.

A question here arises, whether or not, by his failure to assert this right and repudiate the contract by reselling the land, or by suit, or otherwise, for about fourteen years, Izard and Walker being in possession of the land, using and enjoying it during that time, is not a waiver of his right, so as to bar an action to recover the land: *Hill v. Still*, *supra*. By analogy to any statute of limitations which we have in this state, his right of action would be barred in ten years at furthest, after the default of Izard. If the possession of Izard and Walker was not adverse and continuous for ten years, then this rule might not prevail so as to bar Emerson's right of entry and of suit.

It does not follow from this that Walker could enforce a specific performance of the contract, and obtain a title in accordance with the bond without payment of the purchase-money in full. For it may happen that the laches of both parties may be so great that a court of equity would relieve neither of the parties: 1 Story's Eq. Jur., sec. 734. Apart, however, from any question of limitation by analogy, in relation to this subject, we think it was erroneous to instruct the jury that the failure to pay by Izard, absolutely and of itself, put an end to the contract.

The court also charged the jury: 3. "That upon Emerson producing the note, the presumption of payment from the lapse of time was rebutted, and its payment must be proved by other evidence."

The fact of whether or not the note was paid was a question for the jury, and lapse of time, so long as fourteen years, was a circumstance which should have been left to the jury in determining it, notwithstanding the note was produced by Emerson: 1 Greenl. Ev., p. 49, sec. 39.

Other questions in the case need not be considered.

Judgment reversed and cause remanded.

Reversed and remanded.

WHEELER, J., did not sit in this case.

JUDGMENT, EXECUTION SALE, AND SHERIFF'S DEED are necessary to sustain title of purchaser at execution sale. A plaintiff in ejectment relying on execution sale must produce a judgment which will sustain the execution: *Owen v. Barkedale*, 47 Am. Dec. 348; *Blanchard v. Blanchard*, 38 Id. 710; *Lyerly v. Wheeler*, 53 Id. 414; *McEntire v. Durham*, 45 Id. 512, and notes. Generally, however, in case of a lost or destroyed record, parol evidence of its contents is admissible, especially where no higher evidence is shown to exist. A lost or destroyed record may be proved by collateral or secondary evidence: *Pruden v. Alden*, 34 Id. 51; *Eakin v. Vance*, 48 Id. 770; *Lyon v. Bolling*, Id. 122. Part of record, where remainder is shown to have been lost, is admissible in evidence with parol proof of the contents of the part lost: *Harvey v. Thomas*, 36 Id. 141, and notes; *Freeman on Judgments*, sec. 407.

BOND FOR TITLE.—Vendor may bring ejectment against vendee in possession under executory contract of purchase, upon the latter's failure to comply with the terms of the contract: *Seabury v. Stewart*, 58 Am. Dec. 254; *Fears v. Merrill*, 50 Id. 226; such as his default in making the payments stipulated for in the contract, and which were conditions precedent to the execution of a conveyance to the vendee: *Browning v. Estes*, 49 Id. 760. Vendee refusing to go on with contract after paying part of the purchase-money forfeits the amount already paid, and the vendor may bring ejectment and recover the land agreed to be conveyed: *Estes v. Browning*, 60 Id. 238. Where time is not made essence of contract for the sale of real estate, the bargainor will be held to the contract, and compelled to convey, though the purchase-money was not paid or tendered at the exact time fixed in the contract for the payment, provided that compensation can be made him for the delay, and it appears to be conscientious that the conveyance should be made. But the rule is otherwise where parties have made the payment of the money a material and essential part of the contract; and unless the money is paid or tendered at the stipulated time, the obligation of the bargainor to convey is at an end: *Hall v. Delaplaine*, 68 Id. 57, and note.

EFFECTS OF LACHES: See *Johnson v. Toulmin*, 52 Am. Dec. 212; *Smith v. Thompson*, 54 Id. 126, and note.

THE PRINCIPAL CASE IS OBTED to the point that where a vendee in an agreement to make title goes into possession, remains in such possession a great while (in this case from 1850 to 1866), making valuable improvements,

in the absence of proof to the contrary, the presumption would be legitimate that the vendee had fully paid the purchase-money, and was entitled to an absolute deed, in *Rivers v. Washington*, 34 Tex. 267. In case of an agreement to make title, where the vendee is in possession, and has failed to comply with the terms of his contract, the vendor may sue for specific performance, in a proper case, or abandon the contract and bring an action for the recovery of the land: *Keys v. Mason*, 44 Id. 144; *Clay v. Hart*, 49 Id. 438, both citing the principal case. In such a case, where the vendor sues to recover the land, the vendee, not having repudiated the contract otherwise than by failing to pay the purchase-price, may, it seems, bring the money into court and claim specific performance: *Hild v. Linne*, 45 Id. 477. The superior title remains in the vendor until the purchase-money has been paid: *Webster v. Mann*, 52 Id. 416. An execution without a judgment to support it is absolutely null and void: *Allison v. Brookshire*, 38 Id. 202, all citing the principal case.

CAYCE v. POWELL.

[20 TEXAS, 737.]

AUTHORITY CONFERRED UPON MARRIED WOMAN TO LITIGATE IN HER OWN RIGHT implies the capacity on her part to conduct the litigation as shall be most conducive to her own advantage. It is a consequence of this right that she must be held to the use of the ordinary diligence of other suitors, where she is not specially exempted by law from the use of such diligence.

MARRIED WOMAN EMPOWERED BY STATUTE TO SUE AND BE SUED, who has been made a party to a suit, and been personally served with process, and who has appeared by attorney, is bound to inform herself of the result of the suit, and cannot make any want of information a ground for enjoining the judgment, such as that by arrangement between defendant and her husband her answer had been withdrawn, and judgment had gone against her by default, of which she had had no notice until this proceeding was brought.

TO ANNUL JUDGMENT FOR FRAUD, legal or technical fraud is not sufficient; actual positive fraud or fraud in fact must be shown.

ACTION by Hannah Cayce against S. G. Powell and Thomas Cayce, plaintiff's husband, to enjoin a judgment recovered in 1854, by Powell against the said Hannah and Thomas Cayce. In this latter action they had both been served with process, and had answered by attorney, but plaintiff Hannah now alleges that afterwards, by agreement between her husband and Powell's attorney, her answer had been withdrawn, and judgment allowed to go for the amount, execution to be stayed one and two years. A few weeks before filing this petition the sheriff had called upon her with an execution, which was the first she had heard of this judgment. Judgment for defendant, and plaintiff appealed.

McCormick, for the appellant.

MacGreal, for the appellee.

By Court, WHEELER, J. The appellant had been duly served with process in person, and was represented in court by her attorney, who filed her answer; there is no averment or pretense of any want of diligence or fidelity to her interests on his part, or of any fraud or unfairness practiced in the procurement or rendition of the judgment. It is not denied that the consideration of the note was necessary supplies furnished the appellant and her family. But the complaint is, that there was no bill of particulars furnished, and that she had not notice or knowledge of the particular charges, or supplies alleged to have been furnished, and that she was ignorant of the rendition of the judgment until a few weeks before the filing of her petition to have it perpetually enjoined. Can she plead ignorance of the judgment as a ground of equitable relief when she was thus represented in court by her attorney, who was cognizant of and consenting to its rendition, and when it is not pretended that he did not, in good faith, represent what he deemed to be her true interest, and there is no charge of any actual fraud or intentional wrong practiced by the other parties to the judgment? We think not. The authority conferred upon a married woman to litigate in her own right implies the capacity, on her part, to conduct the litigation as shall be most conducive to her own advantage. The law has conferred on her the right to litigate; and the right implies the capability. Otherwise the law should have provided a guardian, or attorney *ad litem*, to conduct her litigation for her. It is a consequence of her capacity to sue and be sued in her own right that she must be held to the use of the ordinary diligence of other suitors, where she is not specially exempted by law from the use of such diligence. Otherwise there would be no conclusiveness in judgments to which married women are parties.

Having been made a party to the suit, and had notice, by the personal service of process, she was bound to inform herself of the result of the suit, and cannot make her want of information a ground of enjoining the judgment. It is said, indeed, that the rendition of the judgment without proof that it was upon a cause of action for which her estate was properly chargeable, was a fraud upon her rights; that it was a legal, as distinguished from a moral, fraud. But it is not legal and technical, but actual, positive fraud in fact, which will author-

ize the annulling of a judgment, or will afford an excuse, under the statute, for not having applied to the court for relief within the time prescribed: Hart. Dig., art. 1599. The plaintiff has not made out a case, either by averment or proof, which will entitle her to the relief sought. There is therefore no error in the judgment, and it is affirmed.

Judgment affirmed.

FRAUD TO VIOLATE JUDGMENT: See *Grassmeyer v. Benson*, 70 Am. Dec. 309, and note.

THE PRINCIPAL CASE IS CITED in *Urquhart v. Womack*, 53 Tex. 648, where the court say: "Married women who are admitted to litigate in their own right are presumed to have the capacity to conduct the litigation as shall be most conducive to their own advantage."

TADLOCK v. ECCLES.

[20 TEXAS, 732.]

WHERE CLAIM OF HOMESTEAD EXEMPTION WAS ADJUDGATED ADVERSELY TO DEFENDANT in an action to foreclose a mortgage upon the premises, it cannot be again interposed as a defense to an action for the possession brought by the purchaser under the foreclosure judgment. This adjudication, until reversed or annulled by some direct proceeding for that purpose, is, whenever brought collaterally in question, conclusive of the matters therein adjudicated.

DECISION OF COURT OF COMPETENT JURISDICTION, DIRECTLY UPON QUESTION, or necessarily involving the decision of a question, is conclusive between the parties and their privies upon the same matter, coming directly in question in a collateral action, in the same or another court of concurrent jurisdiction. Such decree must stand until annulled or reversed by a proper proceeding.

CLAIM OF HOMESTEAD EXEMPTION HAVING BEEN ADJUDGED AGAINST FATHER, his children are bound thereby.

TITLE OF ACT—ONE OBJECT.—The title "An act to consolidate the Texas Monumental Committee and the Texas Military Institute with Rutgersville College," embraces but one object within the meaning of the constitution.

CONSTITUTIONAL PROVISION THAT ACT OF LEGISLATURE SHALL RELATE TO BUT ONE OBJECT, which shall be expressed in its title, only requires that the terms employed in the title of the act should be significant of the subject of its provisions. It does not mean that the word "object" should be understood in the sense of "provision," for that would render the title of the act as long as the act itself. Nor does it intend that no act of legislation shall be constitutional which has reference to the accomplishment of more than one ultimate end.

In April, 1852, Tadlock mortgaged his real estate, including his homestead, to the Texas Monumental Committee, to secure the payment of promissory notes in the sum of five hundred

dollars. Afterwards, by act of the legislature, entitled "An act to consolidate the Texas Monumental Committee and the Texas Military Institute with Rutgersville College," the above mortgagee became merged in the Texas Monument and Military Institute, which latter corporation, in October, 1856, brought suit to foreclose Tadlock's mortgage. To this suit he pleaded that there was no such corporation as plaintiff, as the act creating it was unconstitutional. He also pleaded that before the commencement of this suit he had filed his petition for discharge in bankruptcy, that his indebtedness to the Texas Monumental Committee was set forth in his schedule, that the said committee appeared in court and resisted his discharge, that after a hearing the court decided that he was only entitled to fifty acres of land as a homestead exemption, that he duly appealed from this decision, and that his appeal is still undisposed of. Tadlock afterwards amended this plea, and submitted a more particular description of his homestead reservation, which contained two hundred acres, and interposed a claim therefor, together with mansion-house, improvements, etc. This claim of homestead exemption was decided against Tadlock, and the property ordered to be sold in satisfaction of the mortgage. At a regular sale thereof Eccles became the purchaser, and in May, 1857, brought this action to recover the land. To this action, defendant Tadlock now interposes his claim of homestead exemption, sets out his above-mentioned bankruptcy proceedings, and his pending appeal from the decision rendered therein. Three of Tadlock's children intervened, claiming a homestead privilege in two hundred acres of the land. The opinion states the other necessary facts. Judgment for plaintiff, and his motion for a new trial being overruled, he took this appeal.

Harcourt, for the appellant.

Webb, for the appellee.

By Court, WHEELER, J. The right of the appellant to his homestead exemption was pleaded to the suit brought to foreclose the mortgage; and the judgment therein condemning the land to be sold was a direct adjudication adversely to the right of the defendant, upon the issue made by the plea. The merits of the judgment cannot be brought in question in a collateral action. Until reversed or annulled by some direct proceeding for that purpose, it is and must be held, wherever brought collaterally in question, conclusive of the matters therein adjudi-

cated. There is no better settled principle than that the judgment or decree of a court of competent jurisdiction, directly upon the point, or necessarily involving the decision of the question, is conclusive between the parties and their privies upon the same matter coming directly in question in a collateral action in the same or another court of concurrent jurisdiction. It can make no difference in the application of this principle what may have been the subject-matter of the judgment, provided it be one of which the court rendering it had jurisdiction. If the court rendering the judgment had jurisdiction of the subject-matter and the parties, its decision is conclusive until reversed on appeal or annulled by a proceeding for that purpose. This is a principle too well and firmly established to be questioned or doubted. Nor can it be doubted that the district court of Fayette county had jurisdiction to hear and determine the right of the appellant to the homestead asserted by his plea. If the decision was erroneous, the defendant had his remedy by an appeal or writ of error to reverse the judgment. But until reversed, it must be held conclusively to have determined that question. There is nothing in the nature of the right of homestead to exempt it from the operation of the general principle. There are other rights secured by the constitution which are equally sacred and inviolable. The right of personal liberty and the right of personal security are not less so; yet these and every other right which is secured by the constitution and laws may be divested by the judgment of a court of competent jurisdiction.

If the appellant had made the proof in the former case which he has made in this, the court must have adjudged the question in his favor, or its judgment must have been reversed, upon appeal, by this court. If he neglected or failed to make the proof, the court could not do otherwise than render the judgment which was rendered in the case. But whether he made the proof or not, or whether the court decided erroneously or not in that case, cannot be inquired of in this. The judgment in that case is conclusive of the question. If it were otherwise, there would never be an end of litigation; and questions solemnly adjudicated by a competent tribunal would still remain, as before, open to re-examination.

The precise question now before the court was determined by this court in the case of *Lee v. Kingsbury*, 13 Tex. 68 [62 Am. Dec. 546], which, if there ever could have been a doubt as to the application of the general principle to such a case, must be held decisive of the question.

But it insisted that there are other parties, the children of the defendant, who have intervened in this suit, and who are not concluded by the former judgment, because not parties to it. If the wife were here to assert her rights, she would not be concluded, because not a party to the proceeding, and because she cannot be divested of her right, except by her own voluntary act. But the children cannot control the parents in the disposition of the homestead, or assert a right therein adversely to the act of their parents. The parent has the right to dispose of the homestead without consulting them; and whatever will bind the head of the family will be binding upon them. Their domicile follows that of the parent, and he has the power to choose and renounce it for them at pleasure.

It is further insisted that the former judgment is void, because the act creating the artificial person, plaintiff in that suit, was unconstitutional, and there really was no such person as the Texas Monument and Military Institute. The title of the act by which the plaintiffs in the former suit were created a corporation is the following: "An act to consolidate the Texas Monumental Committee and the Texas Military Institute with Rutgersville College." And it is objected that the act embraces more than one object; and is consequently repugnant to the twenty-fourth section of the general provisions of the state constitution. This objection we do not think tenable. The object expressed in the title of the act is to consolidate the two bodies into one; and the natural inference would be that the one corporation was to be clothed with the rights, privileges, and powers which formerly appertained to the two, now consolidated in one. The terms employed in the title of the act are sufficiently significant of the subject of its provisions; and that was what the clause in the constitution intended. It could not have meant that the word "object" should be understood in the sense of "provision;" for that would render the title of the act as long as the act itself.

Various and numerous provisions may be necessary to accomplish the one general object which an act of the legislature proposes. Nor could it have been intended that no act of legislation should be constitutional which had reference to the accomplishment of more than one ultimate end. For an act having one main or principal object in view may incidentally affect or be promotive of others; and it would be impossible so to legislate as to prevent this consequence. The intention doubtless was to prevent embracing in an act having one osten-

sible object, provisions having no relevancy to that object, but really designed to effectuate other and wholly different objects, and thus to conceal and disguise the real object proposed by the provisions of an act under a false or deceptive title. It could not have been intended to forbid the passage of an act which should have in view, at the same time, the public good and the good of particular individuals; or which should have the combined object of honoring the dead and benefiting the living; which seems to have been the object of the act in question. Its great and leading object is to benefit the living, and this it proposes, in part, to do by paying a tribute of respect to the memory of the departed. We do not think it justly obnoxious to the objection urged to its constitutionality. And we are of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

FORMER JUDGMENT, WHO CONCLUDED BY, AND AS TO WHAT FACTS CONCLUDED.—Judgment of competent tribunal is conclusive upon matters actually determined, and also upon matters which the parties might have litigated in the case: *Ellis v. Clarke*, 70 Am. Dec. 603; it is conclusive as to the questions adjudicated therein: *Grassmeyer v. Beeson*, Id. 309. In the note to *Ellis v. Clarke*, *supra*, it is said that nothing can be pleaded to an action on a judgment that could have been pleaded to the original action except the question of jurisdiction; the defendant is estopped from setting up any matter in defense that was actually determined, or that might have been litigated in the proceedings on which the recovery was had. See also *Lord v. Chadbourne*, 66 Id. 290; *Sawyer v. Woodbury*, Id. 518, and notes; *Horton v. Critchfield*, 65 Id. 701. Judgment of court of record having jurisdiction of cause and parties is conclusive upon parties and privies in all courts until reversed by a court having jurisdiction for that purpose: *Hollister v. Abbott*, 64 Id. 342, and note collecting numerous cases; *Detrick v. Migatt*, 68 Id. 584.

STATUTE TO RELATE TO BUT ONE SUBJECT, WHICH SHALL BE EXPRESSED IN ITS TITLE.—The constitutional provision containing this mandate is discussed in all its bearings in the note to *Davis v. State*, 61 Am. Dec. 337. The subsequent cases in this series are *Keller v. State*, 69 Id. 226; and *People v. McCann*, Id. 642, and cases in notes thereto.

THE PRINCIPAL CASE IS CITED in *Brewer v. Wall*, 23 Tex. 589, and *Johnson v. Taylor*, 43 Id. 122, to the point that after the death of the wife, the husband may sell the homestead if it be his separate property; the children have no interest therein which restricts the father's right to sell; in *McCreery v. Fortson*, 35 Id. 648, to the point that at the death of the husband the wife becomes the head of the family, and she alone is entitled to claim the homestead and other exempted property; in *Magee v. Rice*, 37 Id. 483-500, to the point that where a wife was a homestead claimant in community property, and died leaving minor children, they took her community interest by inheritance, subject only to the rights of creditors, and to the surviving husband's right to occupy the premises as a homestead during his life; and in *Clark v. Nolan*, 38 Id. 416, to the same point. The principal case is cited to the point

that a judgment in a proceeding by attachment, enforcing the attachment lien on land, is no conclusive of the defendant's homestead rights in the land attached, no issue regarding the homestead having been raised by the pleadings; in *Willis v. Matthews*, 46 Id. 478, to the point that in an action where a party has a right to present a matter to the court and thus secure his rights, and neglects to do so, he is concluded by the judgment rendered therein; in *Webb v. Mallard*, 27 Id. 85, the judgment is conclusive of all questions which might properly have been litigated in the case: *Chilson v. Reeves*, 29 Id. 281; *Burford v. Rosenfield*, 37 Id. 45; *Roberts v. Johnson*, 48 Id. 137; *Oldham v. McIvers*, 49 Id. 572.

ACT OF LEGISLATURE TO RELATE TO BUT ONE SUBJECT, WHICH SHALL BE EXPRESSED IN ITS TITLE.—Upon this question the principal case has been cited as an authority, and its doctrine approved, in *City of San Antonio v. Lane*, 32 Tex. 412; *City of San Antonio v. Gould*, 34 Id. 74; *Ex parte House*, 36 Id. 84; *State v. McCracken*, 42 Id. 385; *Gidding v. San Antonio*, 47 Id. 556; *Stone v. Brown*, 54 Id. 345; *H. & T. C. R. R. Co. v. Odum*, 53 Id. 352; *Holden v. State*, 1 Tex. App. 246; *Hasselmeyer v. State*, Id. 698; *Ham v. State*, 4 Id. 699; *Albrecht v. State*, 8 Id. 220. This question has already been lengthily discussed in this series, and it will be unnecessary to more particularly refer to the points to which the above citations were made.

HOWTH v. FRANKLIN.

[20 TEXAS, 798.]

INNKEEPER IS ONE WHO HOLDS HIMSELF OUT TO PUBLIC as engaged in the business of keeping a house for the lodgment and entertainment of travelers, their horses and attendants, for reasonable compensation. He is liable for any loss of property committed to his keeping which any care or vigilance on his part could have prevented.

ONE WHO ONLY OCCASIONALLY ENTERTAINS TRAVELERS FOR COMPENSATION, when it suits his pleasure, and who does not hold himself out to the public as the keeper of a house for the accommodation of the traveling public, is only bound to take that ordinary care of property committed to his keeping that a prudent man does of his own property.

WHEN PROPERTY COMMITTED TO CUSTODY OF INNKEEPER BY HIS GUEST IS LOST, the presumption is that the innkeeper is liable for it, and he can only excuse himself by showing that he has used extreme care and diligence.

PERSON MAY HOLD HIMSELF OUT TO PUBLIC AS INNKEEPER BY HIS ACTS, as well as by declarations, or by a sign, and he may become liable as such even against his declarations.

FARMERS WHOSE HOUSES ARE SITUATED ALONG PUBLIC ROADS of the country, who occasionally, and even frequently, take in and accommodate travelers, and receive compensation therefor, are not innkeepers, nor are they liable as such.

ACTION against appellant, as an innkeeper, for the value of a horse. The opinion states the case.

White and Frear, for the appellant.

Lipscomb and Harris, for the appellee.

By Court, ROBERTS, J. The court charged the jury that "the material question in this case is whether or not the defendant is liable as the keeper of a common inn. An innkeeper is one who holds himself out to the public as engaged in the business of keeping a house for the lodging and entertainment of travelers and passengers, their horses and attendants, for reasonable compensation. He is liable for any loss of property committed to his keeping, which any care or vigilance or diligence on his part could have prevented. If the defendant only occasionally entertained travelers for compensation, when it suited his pleasure to do so, and did not hold himself out to the public as the keeper of an inn or house for the accommodation of the traveling public, then the defendant was only bound to take that ordinary care of property committed to his keeping that a prudent man usually takes of his own property of the same kind; and he would not be liable for a loss unless it was shown that he had failed to use ordinary diligence in the care of the property committed to him."

By the facts as presented in the record, there can be no dispute about anything but as to whether or not Howth was an innkeeper. The diligence used was ordinary, but not extreme; and therefore, if he were an innkeeper, he was liable. When property committed to the custody of an innkeeper by his guest is lost, the presumption is that the innkeeper is liable for it; and he can relieve himself from that liability by showing that he has used extreme diligence. What facts will excuse him is a question, perhaps, not very well settled; but it is well settled that he cannot excuse himself without showing that he has used extreme care and diligence in relation to the property lost: *Edwards on Bailments*, 406; 2 *Kent's Com.* 592.

The charge of the court, then, was correct, in reference to the facts of this case, both as to what constitutes an innkeeper and as to his liability. Had the facts shown that more than ordinary diligence was used in taking care of the horse which was lost, then it might have been required of the court to have been more specific in the charge, as to what facts would excuse an innkeeper, and as to what is meant by extreme diligence under the circumstances.

A person may hold himself out to the public as an innkeeper by his acts as well as by his declarations, or by a sign: *Edwards on Bailments*, 388. His acts might also force that conclusion, even against his declarations. To such conclusion must the jury have come in this case. That was the question

really at issue, and most prominently and fairly presented to them by the court. The record shows that on the one hand his house was on a public road, and much visited by travelers, who were uniformly taken in, entertained, and charged; and that it was well known as a place where entertainment was usually obtained for travelers; on the other hand, his frequent declarations that he did not keep a tavern, his refusal to take boarders, and entertaining his neighbors and countrymen frequently free of charge. Here is presented a conflict in the testimony, leading to different conclusions, which it is peculiarly the province of the jury to judge of and determine upon.

There are numerous farmers situated on the public roads of the country, who occasionally, and even frequently, take in and accommodate travelers, and receive compensation for it, who are not innkeepers, and are not liable as such. It is not their business or occupation, nor do they prepare and fit up their establishments for it. They yield to the laws of hospitality in receiving and entertaining the stranger and the traveler, yet they cannot afford to do so without some compensation. This view of the subject the court also presented to the minds of the jury, by telling them, in substance, that if defendant only occasionally entertained travelers for compensation, when it suited his own pleasure, he did not thereby become an innkeeper.

The question, then, of whether he was an innkeeper or not, having been fully and fairly presented to the jury, and the evidence on that subject being conflicting, the verdict of the jury will not be disturbed. The evidence in favor of Howth on this issue is strong; and had the verdict been in his favor, it would not have been disturbed.

There is, even, as the facts appear to this court, a preponderance in his favor, though not to that extent that would enable us to say that the verdict is certainly wrong; and therefore it must stand.

Judgment affirmed.

WHO ARE INNKEEPERS.—This question is discussed in the note to *Olute v. Wiggins*, 7 Am. Dec. 449, where the principal case is cited with a number of others of similar import. An innkeeper is one who makes it his business to entertain travelers and passengers, and to provide lodging and necessities for them and their attendants: *Kisten v. Hildebrand*, 48 Id. 416. Responsibilities of an innkeeper attach to one keeping an inn *de facto*, although he has no license as required by statute: *Dickerson v. Rogers*, 40 Id. 642. Keeper of coffee-house or boarding-house may occasionally entertain travelers without incurring the liability of an innkeeper: *Kisten v. Hildebrand*, *supra*. The words "tavern," "hotel," and "inn" are defined in the note to *Gray v. Commonwealth*, 35 Id. 136.

LIABILITY OF INNKEEPER FOR LOSS OF GOODS ENTRUSTED TO HIM AS SUCH.—In action on the case "on custom of the land," innkeepers are treated as insurers, and are liable without proof of negligence for the loss of goods or animals left in their charge by guests: *Neal v. Wilcox*, 67 Am. Dec. 266. Innkeeper is liable for damage to guest's horse by the horse of another guest without any negligence on the part of the innkeeper: *Sibley v. Aldrich*, 66 Id. 745. Innkeeper is bound to keep safely and well property of guests, and in case of loss or injury, he can only absolve himself from liability on his part by showing that the loss or injury was without his fault. The burden of proof is upon him: *Johnson v. Richardson*, 63 Id. 369. Innkeeper cannot be exonerated from loss of guest's goods merely upon presumption, or without proof of circumstances ordinarily attending the breaking of a house securely fastened. He is bound to prove the mode in which the goods were taken from him, and that it was without any fault or negligence on his part: *McDaniels v. Robinson*, 62 Id. 574; *Pettigrew v. Barnum*, 69 Id. 212, and notes to all of the above cases.

McCOWN v. SCHRIMPF.

[21 TEXAS, 22.]

WHEN VENDER AGREES AS PART PAYMENT OF PRICE "to release all mortgages" on the property, he is answerable to the mortgagee personally on the debt, and the property is also subject to the mortgage.

PROMISE OF ONE PARTY MADE TO ANOTHER, FOR BENEFIT OF THIRD PARTY, need not state the name of the third party. It will be sufficient if he is in some measure designated as the person intended.

INSTRUCTION SUBSTANTIALLY EMBRACED IN GENERAL CHARGE, or one which is abstract and not warranted by the evidence, should be refused.

STATEMENT OF FACTS IN CIVIL CASE MAY BE PREPARED AND CERTIFIED IN VACATION, when counsel so agree, and the approval of the court is obtained.

APPEAL from Harris county. In 1852, Isaac Thayer and J. W. McCown entered into an agreement by which the former was to put the latter into full possession of a certain hotel and its furniture, for which McCown agreed to pay outstanding debts of Thayer to the amount of three thousand dollars, and also to release all mortgages on the property. The mortgages were on the lease and furniture, and some of the furniture was subsequently sold to pay a prior mortgage. Schrimpf, who was a mortgagee, was advised of and assented to the above agreement. McCown afterwards discovered that Thayer had misrepresented the quality of furniture and demanded a rescission of the contract, which was granted. Schrimpf, the mortgagee, still holds McCown responsible and sues him on the mortgage. The attorneys in this case filed an agreement during the term that the statement of facts might be made up in vacation, and failing to agree in some particulars, submitted the matter to

the judge, who completed the statement and certified to its correctness. The attorneys also filed a stipulation in this court waiving objection to the judge's certificate. Verdict and judgment having been rendered for plaintiff, and a new trial having been denied, defendant appealed from the judge's charge and the motion denying a new trial on the facts.

C. W. Buckley, for the appellant.

C. B. Sabin and A. P. Thompson, for the appellee.

By Court, WHEELER, J. The charge of the court very properly submitted to the jury the inquiry whether the plaintiff was a party or assented to the contract between the defendant and Thayer for the purchase of the property on which the plaintiff held the mortgage; and the jury, we think, were warranted by the evidence in finding the affirmative, and that the sale was made upon the mutual understanding and agreement of all the parties. In that view, there can be no question of the correctness of the charge upon the other questions embraced in it. Nor can there be a question as to the right of the plaintiff to maintain the action. "Where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon such promise:" *Schemerhorn v. Vanderheyden*, 1 Johns. 139 [3 Am. Dec. 304]. Nor is it necessary that the name of the person for whose benefit the promise is made should, in terms, be used. It will be sufficient if he be in some measure pointed out and designated as the person intended. Thus in a covenant with a man and his heirs, or his executors, though the names of the heirs or executors do not appear in the deed, they can sue upon the covenant if broken. So where the defendants covenanted to pay to each and every person such sum or sums of money as the constable should become liable for on account of any execution which might be delivered to him, it was held that an action of covenant might be maintained by a plaintiff in an execution delivered to such constable for collection, and for the payment of which the constable had become liable: *Fellows v. Gilman*, 4 Wend. 414; 1 Ch. Pl. 4, and notes. The defendant, by the terms of his contract, was to "release all mortgages," of which the plaintiff's was one. He therefore, according to the authorities cited, could maintain the action, it would seem, in a court of common law. Undoubtedly he may, in our courts, where it is held that the suit may be brought either by the legal holder or the party beneficially interested in the contract.

The second instruction asked by the defendant was rightly refused, because embraced, substantially, with the proper qualification, in the general charge. The fourth instruction asked was also rightly refused, because abstract, and not warranted by the evidence. The promise of the defendant was not without a consideration, as the instruction assumed. There is no error in the judgment, and it is affirmed.

Judgment affirmed.

VENDOR'S RIGHTS CONCERNING INCUMBRANCES ON LAND: See *Wolbert v. Lucas*, 49 Am. Dec. 578, and extensive note thereto 579-582; *Champlin v. Dotson*, 53 Id. 102, and note 106.

PROMISE MADE TO ANOTHER FOR BENEFIT OF THIRD PARTY need not state name of the third party, if he is in some other way designated as the person intended, to enable such party to sue thereon: *Atcheson v. Scott*, 51 Tex. 213, citing the principal case.

HUNT v. BUTTERWORTH.

[21 TEXAS, 132.]

PERSONAL REPRESENTATIVE OF FRAUDULENT VENDOR, who remained in possession of the property until the time of his death, can, because of the non-delivery, set up the fraud for the benefit of creditors, and thus avoid the sale.

EXECUTOR OR ADMINISTRATOR CANNOT IMPEACH DEED OF HIS TESTATOR OR INTERSTATE FOR FRAUD, except in case of the non-delivery of the fraudulent gift or deed to the donee.

DEMURRAL OF FORMER SUIT WILL BE TECHNICAL BAR TO SUBSEQUENT SUIT upon the same point or matter, and where the same plaintiff or his representatives appears against the same defendant or his representatives.

PETITION by E. P. Hunt, as administrator of the estate of John D. Amis, who died intestate and insolvent, on behalf of the deceased's creditors, against Mary E. Butterworth, for certain slaves. She claims possession under a deed which plaintiff declares was never delivered in the life-time of Amis, but which was fraudulently obtained, registered, and recorded subsequent to his death. Defendant filed in the court below a general demurrer; and set up in bar a decree of the district court of the United States for the district of Texas, at Galveston, in a cause wherein Butterworth and wife were complainants, and J. H. Bennett and E. P. Hunt, the appellant here, were defendants, and which decree was affirmed upon appeal to the supreme court of the United States. In this proceeding there was no impeachment of the deed from Amis to Mrs. Butterworth. A

jury was, in the present case, waived, and the cause submitted to the judge, who dismissed plaintiff's petition. From this judgment an appeal was taken after a motion for a new trial had been overruled.

P. C. Tucker and L. A. Thompson, for the appellant.

Robert Hughes, for the appellees.

By Court, WHEELER, J. Although it appears by the record that the court heard evidence, and thereupon dismissed the case, "because it appears to the court that the plaintiff has no right to maintain his action herein," it is sufficiently apparent that the court did not pronounce its judgment upon the merits of the case as disclosed by the evidence; for, had that been the case, the judgment would not have been that the petition be dismissed, and the defendant go hence, etc., as upon a judgment sustaining a demurrer or exceptions to the petition; but judgment would have been rendered for the defendant, as on a trial upon the merits. But if the court decided the case upon the evidence embraced in the statement of facts, the judgment was plainly erroneous, unless supported by the record of the decree rendered in the United States district court. For, unless the plaintiff was barred of his action by that decree, upon proof that the right of property and the possession remained in the estate at the time of his death, the plaintiff, as his administrator, was entitled to recover the property. Was the decree pleaded and given in evidence a bar to this action? It would seem not. The former suit was brought by two of the present defendants against Bennett to recover the property and for an account. The present plaintiff was made a party; but no decree was asked against him, unless the plaintiffs therein, upon taking an account with Bennett, should be found indebted to him; in which case they ask that this plaintiff, as administrator, be decreed to pay him such balance. And this appears to have been the only object in making him a party to that suit. There was a recovery against Bennett, but the suit was dismissed as to this plaintiff. This suit is brought to set aside the deed, under which the plaintiffs in the former suit claim and hold the property, as invalid and inoperative, and to recover the property. The validity of the deed was not a matter in issue in the former suit by the pleadings therein. That is the very matter which the present suit seeks to put in issue. "A bill regularly dismissed upon the merits, where the matter

has been passed upon, and the dismissal is not without prejudice, may be pleaded in bar of a new bill for the same matter:" 2 Daniell's Ch. Pl., 2d ed., 753, note 3; *Neafie v. Neafie*, 7 Johns. Ch. 1 [11 Am. Dec. 380]. In the case in 7 Johns. Ch., after stating this general rule, Chancellor Kent said: "But in the cases I have looked into upon dismissal of former bills, the new bill was brought by the same party who filed the original bill; and there is said to be a material distinction between a new bill by such a party, and a new bill concerning the same subject by the defendant in the first suit. To make the dismissal of the former suit a technical bar, it must be an absolute decision upon the same point or matter, and the new bill, it is said, must be by the same plaintiff or his representatives, against the same defendant or his representatives:" *Id.* 4. "As a plea of this kind proceeds upon the ground that the same matter was in issue in the former suit, and as every plea that is set up as a bar must be *ad idem*, the plea should set forth so much of the former bill or answer as will suffice to show that the same point was then in issue:" 2 Daniell's Ch. Pl. 755, 756.

From these authorities it seems clear that the decree of dismissal of the bill in the chancery suit was not a bar to the present action. The same point was not in issue in that suit. If, therefore, the court proceeded upon this ground, the judgment was erroneous. But we think it sufficiently apparent from the judgment itself that this was not the ground of the decision. As stated by counsel in argument, the ground of the decision doubtless was, that as this was a suit by the administrator to avoid the deed of his intestate as a fraud upon creditors, the action could not be maintained; and hence the judgment dismissing the petition, as upon demurrer. We shall therefore consider of the correctness of the judgment as having been thus rendered. It may be observed that the petition does not necessarily impeach the deed as having been made with intent to defraud creditors. The grounds distinctly set up to avoid the deed are, that the deed was not delivered or recorded during the life-time of the intestate; but that the defendants wrongfully obtained possession of it after his death. If this was so, it did not take effect as a deed, or operate a conveyance of the property; it was wholly inoperative as a deed, for the want of delivery; and there was no occasion to impeach the consideration of it. Although the administrator might not impeach the deed of his intestate as being voluntary and fraudulent as to creditors, it was certainly competent for him to

show that it was never delivered, and consequently that it did not take effect as a deed; but the title to the property named in it remained in the donor, at the time of his decease, unchanged and unaffected by it. On this ground, it was certainly competent for the administrator to avoid the instrument under which, he avers, the defendants have taken and detained the property. But it is further averred, in effect, that the deed was voluntary and in fraud of creditors; and as this is the ground, doubtless, upon which the court dismissed the case, and the question to which the argument in this court has been mainly directed by counsel for the appellant, it is proper that we proceed to inquire whether the decision of the court was correct. The general proposition has been frequently asserted by this court, that an executor or administrator cannot impeach for fraud the deed of his testator or intestate: *Cobb v. Norwood*, 11 Tex. 556; *Avery v. Avery*, 12 Id. 54 [62 Am. Dec. 513]; *Connell v. Chandler*, 13 Id. 5 [62 Am. Dec. 545]. This, as a general rule, is admitted. But it is insisted that where the fraudulent gift or deed has not been consummated by delivery to the donee in the life-time of the donor, but the latter dies in possession, and there is probate or grant of administration before the donee takes possession, the case is an exception to the general rule, and the property is assets in the hands of the administrator.

We have examined the numerous authorities cited by counsel, and they seem fully to sustain their position. We deem it unnecessary to enter upon a review of the numerous authorities cited by counsel in their learned and able argument upon this point. It will suffice to refer to the comparatively late and well-considered case of *Babcock v. Booth*, 2 Hill (N. Y.), 181 [38 Am. Dec. 578], where the authorities are reviewed. It was there held that, as a general rule, an executor or administrator can only maintain such claims as the testator or intestate might have successfully asserted while living; but that to this rule there are exceptions. And the court recognize and affirm the exception we are now considering. The court, Bronson, J., says: "The title of the plaintiff as administrator took effect, by relation, from the death of the intestate, and he has the same right to maintain this action as though the letters of administration had been granted before the defendant took the goods: *Toller on Executors*, 152, 3d ed., 1834, and cases there cited. The only question, then, to be considered is, whether the personal representative of the fraudulent vendor, who remained in possession until the time of his death, can, for the

benefit of creditors, set up the fraud, and thus avoid the sale." And the court hold that he can; and after reviewing the authorities, conclude that "whatever difficulty there might be in allowing an executor or administrator to set up the fraud, when considered as the mere representative of the testator or intestate, there can be none when he is regarded in the further capacity of a trustee for creditors, and is necessarily acting for their benefit: *Babcock v. Booth*, 2 Hill (N. Y.), 184-186 [38 Am. Dec. 578]; and see *Smith v. Pollard*, 4 B. Mon. 68; *Shears Rogers*, 3 Barn. & Adol. 362; S. C., 23 Eng. Com. L. 164. It is shown that at the common law the fraudulent vendee might have been charged as executor *de son tort*. And some of the modern cases hold that he must be so charged, and that that is the only remedy of the creditor. It was so held in New York in the case of *Osborne v. Moss*, 7 Johns. 161 [5 Am. Dec. 252]. But the statute has changed the rule in that state so that "no person shall be liable to an action as executor of his own wrong:" *Babcock v. Booth*, 2 Hill (N. Y.), 185 [38 Am. Dec. 578]; 2 Tex. R. S. 449, sec. 17. So the law in that state and in this are the same upon that subject, it having been settled by the case of *Ansley v. Baker*, 14 Tex. 607 [65 Am. Dec. 136], that by our law no one can be charged as an executor *de son tort*. The effect of our law is the same as that of the New York statute, to take away the remedy of the creditor, at common law, to charge the fraudulent grantee as executor of his own wrong, and transfer the action to the legal representative of the vendor, where it becomes necessary to sue or controvert the validity of a deed of the testator or intestate for the benefit of creditors. When it has been said that the legal representative cannot impeach the deed of his testator or intestate for fraud, it has also been said that the creditors may: *Avery v. Avery*, 12 Tex. 57 [62 Am. Dec. 513]; *Cobb v. Norwood*, 11 Id. 556. Executors and administrators, by our law, represent the creditors, as well as the heirs; and where it is necessary to sue to set aside a fraudulent conveyance for the benefit of creditors, it would seem to be the better, more convenient, and more reasonable rule that the administrator, rather than the creditor, should sue. The case under consideration does not require the expression of an opinion upon the general question of the right of the administrator to impeach for fraud the deed of his intestate; and our observations are to be understood only as applying to the excepted case, where the deceased retained the possession of the property until his death. In that case we think his right clear, upon principle and authority.

In the cases in which this subject has come under discussion in this court, the exception we are now considering has never been adverted to. The attention of the court has not been called to it in any previous case, or it would, doubtless, have been recognized. And it is to be believed there is no adjudication of this court which stands in the way of its recognition in the present case. No case has been decided to the contrary. The view we have taken of the case, as respects the right of the administrator to maintain the action, supersedes the necessity of revising the judgment upon the appeal of the intervenor. The petition alleges that the estate is largely indebted, and that there are no assets other than the property in question. The administrator must be regarded as representing the creditors in this action. And we are of opinion that the court erred in denying his right to maintain the action and dismissing the case. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

IMPEACHMENT BY EXECUTOR OR ADMINISTRATOR OF INTESTATE'S OR TESTATOR'S DEED FOR FRAUD: See *Avery v. Avery*, 62 Am. Dec. 513, and note 518; *Chandler v. Chandler*, Id. 545, and note 546. In *Hart v. Rust*, 46 Tex. 574, the principal case is cited to the point that an executor or administrator may bring a suit to set aside his testator's or intestate's deed for fraud against his creditors.

DECREE OF DISMISSAL, EFFECT OF, AS RES ADJUDICATA: See *Jarbes v. Smith*, 52 Am. Dec. 541; *Lang v. Waring*, 60 Id. 533, and cases in notes.

DUNHAM v. CHATHAM.

[21 TEXAS, 231.]

PAROL EVIDENCE IS ADMISSIBLE IN EQUITY TO VARY AND REFORM WRITTEN CONTRACTS AND INSTRUMENTS upon the ground of accident, mistake, or fraud, so as to make them conform to the intention of the parties.

WHERE PROPERTY IS GRANTED TO HUSBAND AND WIFE, PAROL EVIDENCE MAY BE INTRODUCED to show that the husband's name was inserted by mistake, and that it was not community but separate property.

ALL PROPERTY ACQUIRED BY WIFE THROUGH GIFT REMAINS TO HER SEPARATELY, though under the management of the husband.

WHERE EQUITY IS MET BY NO OPPOSING EQUITIES, courts have less hesitation in holding that instruments should be so construed as to carry into effect the intention of the makers.

WHERE GIFT IS MADE TO HUSBAND ALONE, PAROL EVIDENCE IS ADMISSIBLE to prove that the gift was in trust for the use of the wife.

WOMAN ACTING AS GUARDIAN, AND INSERTING HER OWN PROPERTY BY MISTAKE in her ward's inventory, is not estopped, in equity, from proving title to the same in herself.

SUIT in equity to have certain personal property declared separate property. The defendant in error, Rotilda Chatham, with her husband, brought suit in 1856, alleging that she was formerly the wife of John H. Dunham, who died in November, 1853, leaving property in his own right, and who had control also of some of the separate property of said Rotilda; that Joseph H. Dunham administered on the estate of deceased, and made out and returned an inventory of the same; that in February, 1855, she discovered that property, consisting of several negroes and land, her separate property derived by gift from her father, was placed on said inventory of the estate of John H. Dunham as community property; that she moved to have the same corrected before the probate court, which was there so ordered to be done; that in the partition which was afterwards made said property was ordered to be partitioned as community property between her and the minor children of decedent. She further set forth the deed of gift from her father, with explanations how and for what purpose the same was made jointly to herself and to her husband, John H. Dunham, deceased, alleging that the partition and the decree thereupon by the probate court were erroneous, and praying for a *certiorari*, etc. Dunham, the plaintiff, answered, admitting that he did administer on the estate of John H. Dunham, and that in placing the negroes on the inventory as community property he acted upon the import of the deed of gift from James Wood, the father; and in regard to the land, that he knew of no special claim on the part of defendant in error therein; and that the application for partition was made by her authority, and that when made, she assented to and approved the same. The minors, by their guardian *ad litem*, set up the deed of gift, and that the defendant in error was estopped by her assent to the partition, as evidenced by various acts and declarations. On the trial, the defendants in error gave in evidence the record of the proceedings in the county court in regard to the estate of John H. Dunham, and the deed of gift from James Wood to John H. Dunham and wife; in connection with the latter, the deposition of Thomas Durham, who proved that he wrote the deed of gift, and that at the time it was executed, Wood, the donor, told him that he intended to give this property to his child, Rotilda. John H. Dunham was present. It was the express

intention of Wood that his child Rotilda should be the prime beneficiary of this gift, but that John H. Dunham might have the control of it as her husband. The name of John H. Dunham was inserted in the deed at the suggestion of witness, to which Wood assented, that he might show his confidence in him. Tillotson Wood, a witness to the deed, testified substantially the same as Durham, and in addition, that Wood, the father of Rotilda, paid five hundred dollars, as part of the purchase-money, for the three hundred and forty-six acres of land mentioned as the homestead and divided as community property. Plaintiff in error then introduced evidence to show that the defendant in error, Rotilda, had not expressed any dissatisfaction with the partition until about the time of her second marriage. They also proved by one of the appraisers of the estate of John H. Dunham, deceased, that the inventory was made at the house of deceased, and that the defendant in error and her father, James Wood, were present, and that he supposed they knew that this property was inventoried as community property; that he heard no objection made, but did not recollect that anything was said to defendant in error on the subject. One of the commissioners appointed by the county clerk to divide the estate of John H. Dunham between his widow and minor children testified that the division was made at the house of defendant in error, and that she was present and offered no objection. They also offered inventories filed by defendant in error in the county court of Grimes county, as guardian of the minor children of John H. Dunham, upon which the negroes in controversy, except one apportioned to her, were entered.

F. H. Merriman, for the plaintiffs in error.

J. W. Hutcheson, for the defendants in error.

By Court, HEMPHILL, C. J. There are two questions of importance in this cause, viz.: 1. Whether parol testimony was admissible to affect the import of the deed from James Wood so as to show that the name of John H. Dunham was inserted by mistake, and that the gift, though purporting to be joint to John H. Dunham and his wife, was intended for the separate benefit of the wife Rotilda, who was the daughter of the donor, James Wood; and 2. Whether, admitting the separate right of the wife Rotilda, she is not estopped by her acts from the assertion of that right.

The import of deeds of purchase to either husband or wife is from necessity affected often by parol evidence. The presump-

tion in favor of the community from such deeds may be rebutted by proof that the purchase was from the separate funds of either partner, and when made in the name of the wife, it may be shown to be for her benefit, not only from the advance by her of the purchase-money, but if the funds be advanced from the individual means of the husband, the presumption of gift arises, and if from the community funds, it may be proved that the husband intended a gift, and declaring such intention, ordered the deed in her name: *Higgins v. Johnson*, 20 Tex. 389 [70 Am. Dec. 394].

This constant practice of resorting to parol evidence to establish the right of ownership in marital property acquired by purchase is an argument for relaxing the strictness of the rule in relation to such property acquired by donation, and especially where the instrument, being joint to husband and wife, purports to give the property to the community. As a general rule of law, parol evidence is admitted in equity to vary and reform written contracts and instruments upon the ground of accident, mistake, or fraud, so as to make them conform to the actual intention of the parties: 1 Story's Eq. Jur., secs. 156-167. It may be and is difficult to reconcile this principle with the rule which, in a common-law court, excludes parol evidence to explain or vary written instruments. Under our system and in the courts of this state, both are rules of equal authority; the rule of exclusion being modified by that of admission in the case and under the circumstances in which, at equity, it has been held to be applicable.

The rule in equity as to the admission of parol evidence so as to make the instrument conform to the intention of the parties is well expressed in *Hunt v. Rousmaniere*, 1 Pet. 12, and is to the effect that where an instrument is drawn and executed which professes, or is intended to carry into execution, an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draughtsman, either as to fact or law, does not fulfill, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement.

This rule, so far as it declares that instruments shall be conformed to the intention of the parties, is applicable to the case in hand.

It is shown by the evidence of two witnesses, one of whom wrote the instrument, that James Wood, the maker, intended to give the slaves to his daughter Rotilda for her separate use,

and not jointly to her and her husband; that this intention was expressly stated at the time by Mr. Wood; that the name of the husband, John H. Dunham, was inserted in the instrument with the intention that he should control or manage the property as trustee, and to express the confidence of the makers in him as such trustee; that his name was inserted at the suggestion of the witness who acted as scrivener on the occasion; that the gift of the slaves was in fact to the daughter, the husband only to have the control. There appears to have been a family meeting, at which Mr. Wood, the father, made a partial division of his property to equalize the portions of his children. The witness Durham, who did the writing, having staid with them for a day or two, and the matters being thoroughly discussed by all the members of the family, must be presumed to have been well informed of the intention of the donor in making the gift. The rule of law that all property acquired by the wife through gift remains to her separately, though under the management of the husband, has been so long established that actual knowledge of its existence may with good reason be presumed, and it is but fair to presume that in this country, where by law there is a separation of property between man and wife, a parent would so make a gift to a married daughter as that, in conformity with natural feeling and the general law, it would vest in her separate right; and this presumption gives additional force to the statement of the witnesses that such, in this instance, was the fact.

This is not a case in which, on the advice of "counsel learned in the law," a party has deliberately selected and designated a certain form of instrument as the best adapted to convey property according to his intention. There is no evidence that Durham, the writer, was a lawyer. On the contrary, his volunteered advice to insert the name of the husband is proof of his ignorance of the law on the subject-matter. There was not such deliberation and advice in the framing of the instrument as would operate as a circumstance to induce the rejection of relief from the legal import and effect of its terms. The object was a gift to the daughter, and this ought not to be defeated by the mistaken suggestion of an ignorant scrivener that the husband should be joined with the wife, and thus make him a trustee and show confidence in him, and, substantially, that such would be the legal effect of the insertion of his name. It must be remembered, also, that this is not a controversy between the wife and purchasers from the husband without notice, or

creditors. The issue is by the heirs of the husband, whose claims are little, if at all, superior to those of the husband himself. The contest is, in substance, between the original parties to the instrument. The equity of the wife is met by no opposing equities, and under such circumstances courts have less hesitation in holding that instruments should be so construed as to carry into effect the intention of the makers.

The evidence shows that the donor intended the husband to act as trustee. Had the gift been to the husband alone, it might have shown by parol evidence that the gift was in trust for the use of the wife. It has been held in several cases that the creation of trusts by parol and the proof of them by parol evidence has not been prohibited by the statutes of this state, and if a trust for the wife by parol could be fastened upon a separate gift to the husband, much more naturally and reasonably would it attach to a joint gift to the husband and wife. We conclude that parol evidence was admissible to show that the gift, though joint to husband and wife on the face of the deed, was intended and should operate only as a gift to the wife, and that the evidence was sufficient to establish that such was the intention of the gift.

The next question, viz., was the wife estopped by her acts from claiming these slaves in her individual right? must be answered in the negative. The fact that the slaves were inserted by the administrator in the inventory as community property is of but slight consequence, and should not affect the wife; and although she appears subsequently to have been either ignorant of or remiss in relation to her rights, yet she seems to have had some knowledge of them and became dissatisfied, and an order was made by the county court for the correction of the inventory, which was in fact never executed. But it is said that she did not object to the division, but, on the contrary, expressed her satisfaction, and showed her acquiescence by receiving the shares of her minor children, as their guardian, and placing in the inventory of her wards property which she is now claiming as her own. If this were all admitted, yet the presumption of law is that women are not well informed of their rights; and the appellee, Rotilda, as appears from the evidence, forms no exception to what may be regarded as a general rule. During marriage she labored under the ordinary disability of supposed incompetency to contract, and in her widowhood she appears to have relied on the administrator. She does not appear to have had a full knowledge of her

rights until the duties and responsibilities of approaching marriage aroused her to a sense of her situation. But the estoppel which is claimed is of that class styled equitable, and this only arises when the contract of the party estopped is fraudulent in its purpose or unjust in its result: *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. 784.

There must be some admission or act intended to influence the conduct of another, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction: *Dezell v. Odell*, 3 Hill (N. Y.), 219 [38 Am. Dec. 628]. Now, is there any fraud in the wife contravening the right of the husband or his heirs in this property? or would there be any injustice in assigning the wife this property if it was really her own? The conduct of the heirs has not been influenced by her acts. They have been led into no line of dealing which must operate to their prejudice unless their mother be estopped from disturbing the property as now arranged.

They have made no sales or contracts with reference to these slaves. There was no equivalent or compensation given the widow at the distribution, and they cannot complain if they be restricted to the property to which they have legal right, and that the widow should reclaim that which was not theirs, but was always her own.

There is no fraud or injustice in an arrangement by which claimants should have their own property and no more, and there are no circumstances in this case which would make justice to the widow operate a legal injury to the heirs of the husband.

But no change was wrought in the property before the suing out of the *certiorari*, except that it passed from the administrator into the hands of the distributees. This writ may not operate as a *supersedeas*, so as to affect any arrangements or sales of property by a distributee prior to the writ. But there had been no substantial change. The property remained as originally divided, and the *certiorari* related back to the partition, and no matter what she said, or how much satisfaction she may have expressed at the distribution, yet if she brings her writ in time her mere acquiescence previously goes for nothing.

The proceedings are to be revised and corrected. They are not final in an appellate sense until after the lapse of two years.

The judgment may be reversed or reformed as the law may

require, and the property redistributed according to the very right of the parties in the cause. Any rights which may have grown up under the judgment of the county court, prior to the *supersedeas*, cannot be disturbed, as, for instance, rights claimed through public sale under the judgment, etc. The other questions in this cause require no special consideration.

We are of opinion that the judgment of the district court should be affirmed, except in so far as it adjudges all the costs against the defendants. The administrator was not a necessary, scarcely a proper, party to this suit. The allegations of undue influence exercised by him appear to be but slightly supported by the evidence. In making the inventory, he properly regarded the face and legal import of the deed as his guide. Had the slaves been inventoried and distributed to the wife as her separate property, the partition might have been disturbed years afterwards by the minors; and if in the mean time the witnesses to the trust in the deed had died, the division would have been set aside; and the charges now brought against the administrator by the widow would then have been urged against both the widow and the administrator. The costs should come out of the property in controversy. We are of opinion that the costs in both the district and in this court should be equally divided between the plaintiffs in the suit below and the minors, by their guardian *ad litem*, who are defendants; that the judgment of the district court be reformed so far as it adjudges costs against all of the defendants; and that in all other respects the judgment be affirmed.

Judgment affirmed.

PAROL EVIDENCE, ADMISSIBILITY TO SHOW FRAUD OR MISTAKE FOR PURPOSE OF OBTAINING REFORMATION OF CONTRACT: See *Osborn v. Phelps*, 48 Am. Dec. 133, and note; *Yates v. Cole*, 59 Id. 602.

GIFT TO WIFE, WHETHER SEPARATE OR COMMUNITY PROPERTY, AND PRESUMPTIONS CONCERNING: See *Higgins v. Johnson*, 70 Am. Dec. 394, and cases cited in note. The presumption, where property is given jointly to husband and wife, is that it is community property: *Burleson v. Burleson*, 28 Tex. 411; but this may be rebutted by parol proof that it is a gift to the wife as separate property: *Johnson v. Buford*, 39 Id. 249; and if a deed is made to the husband, it may be proved by parol to be held in trust for the wife: *Reeves v. Bass*, 39 Id. 631; *Hughes v. Delaney*, 44 Id. 532, all citing the principal case.

INVENTORY IN GUARDIANSHIP MATTER IS DEEMED PRIMA FACIE EVIDENCE of title in the estate, but this may be rebutted by proof that it was in another: See *Little v. Birdwell*, *post*, p. 242, citing the principal case.

EVIDENCE PERTINENT TO ISSUE GENERALLY SHOULD BE ADMITTED: *Scoby v. Sweett*, 28 Tex. 726, citing the principal case.

DEEL v. BERRY.

[21 TEXAS, 463.]

AGREEMENT TO PAY IN SPECIFIC ARTICLES AT TIME FIXED compels debtor to become the first actor, and to tender the articles to save himself from default.

WHERE PONDEROUS ARTICLES ARE TO BE DELIVERED BY PROMISOR AT TIME SPECIFIED, but place unknown, he must request the promisee to designate a convenient place of delivery.

IF DEBT IS TO BE PAID IN SERVICES, AND TIME OF PERFORMANCE IS SPECIFIED, the promisor must be the first actor.

WHERE NOTE IS TO BE PAID BY CERTAIN DAY IN SERVICES OR MONEY, the maker has until the maturity of the note to make his election, but if not then made, he becomes liable as for a demand in money.

ACTION on a promissory note. The opinion states the facts.

M. D. Graham and G. C. Robertson, for the defendant in error.

By Court, HEMPHILL, C. J. This was a suit by Henry Berry (the bearer), claiming one hundred and fifty dollars, with interest, on the following promissory note:

"On or before the first day of January next, I promise to pay John Ray, or bearer, one hundred and seventy-five dollars, to be paid in carpenter's work, and if not paid in carpenter's work, then one hundred and fifty dollars in money will discharge this note. The consideration of this note is the hire of a negro boy by the name of Wash, for the remainder of this year, for value received.

[Signed]

"JOHN DEEL

"March 1, 1855."

The defendant demurred specially: 1. That no demand for the work is set forth in the petition; 2. That the discharge of the contract in money is the privilege of the defendant, and the plaintiff has no right to demand payment in money; and he pleaded also that he had at different times, both before and since the note became due, tendered to do the carpenter's work, and was always ready and willing so to do both before and at the time of the note's maturity, with other allegations of tender to the plaintiff to do the work as soon as it was ascertained that he had the note.

The plaintiff excepted to that portion of the answer which averred a tender after maturity of the note.

The exception of plaintiff to the answer of defendant was sustained, and that of defendant to the petition was overruled.

The first ground of exception by the defendant is that no demand by the plaintiff for the work is alleged in the petition.

Under the terms of this contract no demand was necessary on the part of the plaintiff. Where the agreement is to pay in specific articles, without designation of time or place, there seems some diversity of opinion as to whether the creditor must demand payment, or whether the payor must first seek the payee and offer to perform the stipulation in the contract. But where the time is fixed, the vendor or debtor becomes the first actor, and must tender the articles to save himself from default: *Chipman on Cont.* 28, 29; *Barr v. Myers*, 3 Watts & S. 295; *Roberts v. Beatty*, 2 Penr. & W. 63, 71, 72; *Lobdell v. Hopkins*, 5 Cow. 516; *Vance v. Bloomer*, 20 Wend. 196. Where the time is specified but not the place, and the articles are ponderous, the promisor must request the promisee to designate a convenient place of delivery: 2 Kent's Com. 507; 1 Parsons on Cont., 7th ed., p. 570.

The fact that the debt was to be paid in services, and not in goods, does not affect the principle requiring the promisor, when the time of performance is specified, to be the first actor. The defendant was bound to tender the work or performance before or at the day fixed by the agreement. The right of the plaintiff to appoint the place where the work must be done, and also the articles of work, need not be discussed, as such questions are not involved in the cause.

From a review of the authorities, we believe that the plaintiff was not bound, in support of this action, to show a demand, and that in this particular there is no ground for the exception of the defendant.

The next ground of the defendant's exception, viz., as to his privilege to pay in either money or services, will be considered in connection with the exception of the plaintiff to the averment by the defendant of tender of the work after the maturity of the note.

There is no doubt that by the contract the defendant had the privilege, until the maturity of the note, to pay in either services or money. He had, until that day, the right of election. The note not being then discharged, his right of election was lost, and he became liable as for a demand in money, the amount of which had been agreed upon and settled between the parties: *Story on Cont.*, sec. 969; *Dunman v. Strother*, 1 Tex. 89.

The defendant having lost his right to pay in services, after the specified time had passed, there was no error in sustaining

the exception to the plea of tender after the maturity of the note. The judgment is affirmed.

Judgment affirmed.

SALE, DELIVERY OF BULKY ARTICLES: See extensive note to *Shindler v Houston*, 49 Am. Dec. 334-339, where this question is discussed, and many cases cited.

VICKERY v. HOBBS.

[21 TEXAS, 570.]

DIRECTION BY TESTATOR THAT HIS WILL SHALL BE DRAWN, containing the condition that it shall be valid only in the event of his death during his then sickness, and void if he should recover, must be complied with, and the condition inserted, and it will be held fraud if it is not so inserted; and no subsequent declaration by the testator that he is satisfied with the will, if thus deceived, operates to make it valid.

WILL LIMITED IN ITS OPERATION BY CONDITIONS that defeat it before the death of the testator is void unless republished by the testator.

IF WILL HAS BEEN DEFEATED BY ITS OWN LIMITED CONDITIONS, its mere possession and preservation by the testator until his death does not amount to a republication.

ORAL TESTIMONY WILL NOT BE ADMITTED TO VARY OR CONTRADICT TERMS OF WILL which is properly drawn, and the contents of which are thoroughly understood by the testator.

WHERE WILL IS DRAWN BY LEGATEE OR OTHER BENEFICIARY, closer scrutiny and stricter proof will be required than under ordinary circumstances that no fraud has been committed upon the testator, and that he is fully competent to make a will.

PETITION TO SET ASIDE WILL should contain all the grounds necessary to effect that purpose, and other points brought out on the trial by proof should not be submitted by the judge to the jury.

SUIT to set aside a will. Albert Vickery was directed by one Voctary Hobbs to draw up his will. Hobbs was sick in bed at the time, and directed that Vickery, who was made a beneficiary under the will, should state in the instrument that in the event of his recovery it should be void. This condition Vickery failed to insert. Hobbs recovered from that illness, and died eight or ten months subsequently. The appellant demurred to the petition. He also pleaded the judgment of the county court admitting the will to probate, and denied all and singular, etc. On the trial the appellee proved that he was the father of Voctary Hobbs. The opinion contains the remainder of the testimony. Verdict and judgment was rendered for the plaintiff, and a new trial denied.

Selmar and Hubbard, for the appellants.

S. M. Hyde, for the appellee.

By Court, WHEELER, J. The authority of the court to entertain this suit is maintained by the decision in the case of *Parker v. Parker*, 10 Tex. 83, where the question was fully considered and determined in favor of the jurisdiction.

The ground on which the plaintiff in his petition seeks to revoke the probate and set aside the will is fraud practiced upon the testator by the defendant who wrote the will, in failing to embody in it, as directed by the testator, the condition that it should be valid only in the event that the testator died during his then sickness, but should he recover therefrom it should be void; and in reading it to the testator, before signing, as containing that condition.

It is insisted that the petition is insufficient, and that there is no ground shown for setting aside the will, because it was revocable by the testator at pleasure. It is true, the testator might have revoked or canceled the will, but the belief that it was by its terms inoperative upon his recovery may have been the reason why he omitted to do so.

As a will does not take effect until the death of the testator, and it requires that event to call it into operation, if it is limited as to its operation by conditions by which it is defeated before the death of the party making it, it is difficult to understand how it can have effect as a will, unless by force of a republication by the testator. If the will was to have taken effect only upon condition that Hobbs died of his then sickness, and he did not die but recovered, it would seem that the operation of the will was defeated by the failure of the contingency upon the happening of which it was to have taken effect. And to this effect are the authorities. In the case of *Todd's Will*, 2 Watts & S. 145, a similar condition was held to limit and defeat the operation of the will, though it was not expressed, as in this case, that upon failure of the contingency the will should be void. There the testator, in contemplation of a journey, left a testamentary paper with his intended executor, commencing thus: "My wish, desire, and intention now is, that if I should not return (which I will, no preventing Providence), what I own shall be divided as follows;" proceeding to make a disposition of his property. The court thought it evident that this arrangement of his affairs was intended to be provisional, and not to serve in the event of his death at home; and he having returned and died in about a

month thereafter, the court held that the instrument ought not to be admitted to probate.

On that occasion Chief Justice Gibson said: "No text-writer seems to have distinguished between a condition attached to a particular testamentary disposition and a condition attached to the operation of the instrument." But in *Parsons v. Lanoe*, 1 Ves. sen. 191, Lord Hardwicke said, without hesitation, that he would not require an authority for such a distinction, and that a paper subject to a condition ought not to be admitted to probate after failure of the contingency on the happening of which it was to have taken effect. Why should it be proved as a will when it could not have the effect of one? In that case the words "I make my will in manner following: If I die before my return from my journey to Ireland," etc., were held to make the whole contingent, chiefly, it would seem, because the words "in manner" were deemed equivalent to the words "on condition." And in *Sinclair v. Howe*, 6 Ves. 608, where the words were: "In case I die before I rejoin my beloved wife," it was thought the whole codicil was intended to depend on that event, because the whole property was devised to the wife, except a portion of it dependent on her interest. But the intention, it was said, to make the operation of the paper eventual, was not near so apparent in either of those cases as in the case then before the court. In the present case, had the condition been inserted, the intention would not have been left to construction, but would have been express and clear beyond question.

It must have been respected; and the consequence would be that the instrument could not have taken effect as a will. The decision of the case, therefore, depended on the question whether, when the deceased signed the paper, he supposed it contained the condition mentioned. There was the testimony of a witness positively to the fact that it was read to Hobbs as containing the condition; and another testified to his declarations, and there were other circumstances in evidence tending to support the conclusion that he must have so understood it. One witness, however, testified that it was not in the will, but was the understanding that if Hobbs did not die in that spell of sickness the will should be void. If the witness meant to say that it was not in the will as read to Hobbs, and he signed knowing it was not, his testimony is opposed to that of the first witness. The one gave his testimony when the will was admitted to probate; the other from his recollection some years later. The weight to be given to their respective statements was for the

jury, aided by the other evidence in the case. If the will was written as intended by Hobbs, and he knew its contents when he signed it, I apprehend that oral testimony of an understanding outside of it could not be received to contradict or vary its terms. But it is to be observed that where, as in this case, a will is written by one who takes a benefit under it, that is a circumstance to excite stricter scrutiny, and require stricter proof, not only of volition and capacity, but that the testator knew the contents of the paper he was signing, and that no fraud, deception, or imposition was practiced upon him. It ought clearly and satisfactorily to appear that he was not imposed upon, but that he knew what he was doing, was fully apprised of the contents and effect of the instrument, and the dispositions he was making when he signed it: 1 Jarman on Wills, 40-45 et seq., and notes. If the deceased was deceived at the time of signing, and supposed the writing contained the condition in question, no subsequent declarations of his, such as testified to by some of the witnesses, that he was satisfied with the will and it should stand, could have the effect to make it his will. Being inoperative, nothing short of a republication could impart to it vitality so that his death would call it into operation. The only effect which those declarations could have would be as circumstances tending in some degree, perhaps, to throw light on the question of his knowledge of the contents of the will at the time of signing.

The question of imposition or deception and knowledge, on the part of the testator, of the contents of the writing, was for the jury, under the evidence; and there would be no ground of reversal had not the court erred in the charge delivered, to the effect that if the will was read to Hobbs as providing two steers to defray burial expenses, they should find for the plaintiff. There was no such ground of avoidance of the will alleged in the petition; nor was there any charge of imposition or fraud, except in the one particular of the alleged condition. There was, therefore, no averment in support of which the matter of the two steers might have been submitted as a circumstance to be considered by the jury. Nor was it submitted as a circumstance merely, but as a controlling fact, which should determine their verdict if the will was read to Hobbs as containing the provision. All the witnesses who spoke to the fact of hearing the will read at the time of signing testified that it did contain, or was read as containing, such a provision. The jury could not discredit it; and under the charge of the court as to

its effect, they had no alternative, but were bound to find for the plaintiff, whatever their opinion might have been upon the real question at issue in the case. What influence the circumstance of reading the will as containing that provision might have had under such averments as to have rendered it legally admissible, it is not necessary to determine; considered by itself, it would seem, at most, but a slight circumstance to show fraud and imposition. It will suffice to say, that under the averments of the petition, it was not entitled to the effect ascribed to it by the charge of the court; and as this error in the charge may have controlled the verdict, it will require a reversal of the judgment. If the court deemed that matter of such consequence, we cannot say that it had not equal influence on the minds of the jury, looking, as they must, to the court for the law of the case. The judgment must be reversed, and the cause remanded.

Reversed and remanded.

WILL WRITTEN BY BENEFICIARY UNDER IT: See *Hughes v. Meredith*, 71 Am. Dec. 127, and extensive note thereto 129-134, discussing this subject very fully. In *Ross v. Samos*, 33 Tex. 766, the principal case is cited to the point that if a will is in the handwriting of a principal legatee, this of itself should cast such a suspicion on the will as to require explanation by proof.

LITTLE v. BIRDWELL.

[21 TEXAS, 597.]

PROBATE AND DISTRICT COURTS MAY HAVE CONCURRENT JURISDICTION in certain cases.

WHERE QUESTIONS OF TITLE ARE INVOLVED, or the decision of the case brings in question the construction of a will, it is proper to invoke the jurisdiction of the district court.

INVENTORY RETURNED IN PROBATE PROCEEDING is to be deemed but *prima facie* evidence of title in the estate, which may be rebutted by proof that the title was not in the testator but in another. Legal right to show by proof true title does not depend upon the knowledge or ignorance of the state of the title by a party at the time of returning an inventory.

IF PARTY MAKES ADMISSIONS IN INVENTORY IN PROBATE PROCEEDING as to certain property, this does not act as an estoppel *in pais*; and to constitute it an estoppel *in pais*, the admission it contains must have been acted on by others, who would be prejudiced in consequence were the party who made the admission permitted to retract it.

PROMISE MADE BY HUSBAND TO GRANT CERTAIN PERSONAL PROPERTY to his wife, upon her paying his debt, simply creates an obligation or duty on the part of the husband to vest title in the wife.

VERBAL SALES AND GIFTS BETWEEN HUSBAND AND WIFE ought not to be admitted unless on clear and satisfactory proof that the property was divested out of the vendor and vested in the vendee or donee.

CONDITION IN WILL IN RESTRAINT OF MARRIAGE GENERALLY is utterly void as against public policy, and the due economy and morality of domestic life.

WHERE CONDITION IN WILL IS NOT IN RESTRAINT OF MARRIAGE GENERALLY, but is too rigid and restrains the choice unreasonably, it is utterly void.

WHERE USE OF PROPERTY BY WIDOW IS LIMITED BY WILL TO HER MARRIAGE, such a limitation is not in restraint of marriage, and is valid.

AFFIDAVITS OF JURORS SHOULD NOT BE RECEIVED TO IMPEACH THEIR VERDICT.

SUIT by children of Richard J. Ball to recover from his administrators, the appellants, certain slaves, of which they were in possession, and to which they set up title in themselves; and for hire, etc. The appellants filed a general demurrer and special exceptions to the jurisdiction of the court, which were overruled. They then answered, alleging that the slaves were the separate property of Elizabeth A. Little, one of the appellants. On the trial the appellees introduced the petition of E. A. Ball to the county court for the probate of the will of Richard J. Ball, deceased, the order of said court admitting said will to probate and record, the will itself, and other probate papers, including the inventory returned by her. The instrument was a nuncupative will, and read as follows: "First, that my wife, Elizabeth A. Ball, keep and have my property during her life-time or widowhood, to raise and educate the children, and then to be divided equally among my children by her." The property in controversy was placed upon the inventory filed by her. By a subsequent order, Lewis A. Little and Elizabeth A. Little were appointed administrators of said estate, and filed another inventory, omitting the negroes claimed by said Elizabeth as her separate property. It was proved that the appellant Elizabeth A. was the widow of Richard J. Ball, deceased, and that she intermarried with her co-defendant Little about two years before; that the appellees were the children of R. J. Ball and the appellant Elizabeth A. Little. It was also proved that the negroes in controversy were the property of Richard J. Ball, in Alabama, Mississippi, and Louisiana. The appellants called a witness who proved that R. J. Ball started with his family from the state of Alabama for the state of Mississippi, in 1832, in company with witness; that he had the slaves Hannah and Andy in possession; that he (Ball) was stopped by some officer upon some kind of process; that Ball's

wife gave the officer an order on her guardian for the amount of the claim for which Ball was stopped; that witness and one Finley signed a bond to the officer, conditioned that if the order was not paid, the negroes Hannah and Andy should be delivered up to him; that Ball said to his wife at the time that if the order was paid the said slaves should be hers. Witness testified that Ball told him that the order was paid by his wife's guardian; that while Ball lived in Mississippi witness made a trade with him for the negroes Hannah and Andy, but upon applying to the defendant Elizabeth A. to join in the sale, she refused, alleging that the slaves were hers. Witness once suggested to Ball to make a deed of the negroes to his wife, and have it recorded, which he declined to do. The appellants then offered to read in evidence a report made by them to the county clerk, made at March term, 1856, a portion of which was admitted, but the greater portion was rejected. They proved certain payments made by them on the account of the estate, and boarding and clothing furnished one of the children. The appellees obtained a verdict in their favor. Appellants moved for a new trial upon several grounds, among them, because a paper which had been read in evidence and commented on by counsel was, by mistake, withheld from the jury on their retirement; and if said paper had been before the jury, their finding would have been in favor of the appellants; in support of which ground five of the jurors swore that had said paper been before them the finding would have been different. Motion overruled.

S. P. Hollingsworth, for the appellants.

William Stedman, J. C. Robertson, and N. G. Bagley, for the appellees.

By Court, **WHEELER, J.** The grounds relied on for a reversal of the judgment are: 1. That the district court had not jurisdiction of that case; 2. That the court erred in the charge to the jury, and in refusing instructions asked by the defendants; 3. That a new trial ought to have been granted upon the affidavit of certain of the jurors.

The jurisdiction of the court is clearly maintainable on the authority of *Howze v. Howze*, 14 Tex. 232, and the cases there cited. The defendants contested the plaintiffs' title, and set up title in the wife: 1. To the property absolutely, as the separate property of the wife; 2. To a life estate in the wife, under the provision of the will of the plaintiffs' ancestor. Either pretension, on the part of the defendants, entitled the

plaintiffs to sue for the maintenance of their right in the district court. It cannot be questioned that the jurisdiction conferred upon that court by the law of its constitution and organization is sufficiently comprehensive to embrace this case. And although it may be a case of which the probate court could take cognizance, that would not necessarily conclude the right of the district court to entertain jurisdiction. These courts may have concurrent jurisdiction in certain cases. But in cases like the present, where questions of title are involved, or the decision of the case brings in question the construction of a will, it is proper to invoke the jurisdiction of the district court, as the more appropriate tribunal for the adjudication of such questions: *Smith v. Smith*, 11 Tex. 102, and cases cited; *Parker v. Parker*, 10 Id. 83; *Purvis v. Sherrod*, 12 Id. 140.

The charge of the court complained of was to the effect that the inventory returned by the widow was conclusive evidence against her upon the question of title, unless she acted in ignorance of her rights. And we are of opinion that this charge is not correct. The contrary was held in the case of *White v. Shepperd*, 16 Tex. 167. The effect to be given to the inventory in cases like the present has been brought under discussion in several cases lately decided; and the result of these cases is that the inventory thus returned is to be deemed but *prima facie* evidence of title in the estate, which may be rebutted by proof that in point of fact the title was not in the testator or intestate, but in another: *Carroll v. Carroll*, 20 Id. 731, and *Cheatham v. Burnham*, not reported, lately decided at Galveston.

The widow was not estopped or concluded from asserting her right or separate property, although she had returned an inventory of the property as belonging to the estate of her deceased husband. Nor was it necessary, in order to admit proof of her title, that it should appear that, in returning the inventory, she acted in ignorance of her rights. The statute (Hart. Dig., art. 1151) declares that the inventory shall not be conclusive if it be shown that the property was not separate or common property, as specified therein. It does not make the right to show by proof the true state of the title depend upon the knowledge or ignorance of the state of the title, by the party, at the time of returning the inventory. Its effect is to make the inventory but *prima facie* evidence, as against the party, that the title is as represented in the inventory. And so it would be, it is believed, on general principles. It is not an estoppel in deed:

and to constitute it an estoppel *in pais*, the admission it contains must have been acted on by others, who would be prejudiced in consequence, were the party who made the admission permitted to retract it. It must be such as that good faith and fair dealing towards others, who have received it as true and acted upon it, forbid that it be retracted; which does not appear to be the case in this instance. The defendants' evidence of title was admitted without objection; and the material question to be determined is whether it was sufficient to have warranted a different verdict had there been no error in the charge of the court. We are of opinion that it was not. It is to be observed that the act or declaration relied on as evidencing a transfer of title occurred in a state where the common law prevailed, and its effect is to be determined accordingly. The declaration of the husband was that if the money was paid upon the wife's order the negro should be hers. The import of the language was rather to create an obligation or duty on the part of the husband to vest title in the wife, than to evidence a present transfer of the title. If it be admitted that the language evidenced an intention to vest the property in the wife for her separate and exclusive use, which would have been necessary to constitute it her separate property by the common law or the law of Alabama (*Nimmo v. Davis*, 7 Tex. 25, and authorities cited), yet, it is conceived, it would not be held in that state to operate a present transfer of the property or to create an obligation which a court of equity would enforce.

Although courts of equity will sustain a gift by a husband to the wife which amounts only to a reasonable provision for her, yet they require clear and incontrovertible evidence to establish such gift as matter of intention and fact: 2 Story's Eq. Jur., sec. 1375. If the wife was entitled to have a provision made for her sole use on account of the appropriation of her money by the husband, it would only be of the sum thus appropriated, and it does not appear what that sum was. It may have been an inconsiderable amount. Possibly, if it appeared that it was of value sufficient, it might have been held by a court of equity, under the circumstances, that the property in the negro should be secured to the wife, or some equivalent provision should be made for her out of property of the husband. It has been ruled that where property of the wife has been reduced into possession by the husband, yet if it appear that he did not intend to convert it to his own use, it is in law the property of the wife: *Hind's Estate*, 5 Whart. 138 [34 Am. Dec. 542]. And

although the rule is that reduction into possession by the husband of his wife's choses in action is *prima facie* evidence of conversion to his own use, yet the presumption of intention may be repelled by disproof of the fact in the particular instance: *McDowell v. Potter*, 8 Pa. St. 191, 192 [49 Am. Dec. 503]. But the material question to be here determined is whether there was an actual transfer to the wife of the property in question; and we think it must be held that there was not. It cannot, we think, be maintained, upon the evidence which the record discloses, of the mere oral declaration of the husband, unattended by any corresponding act, evidencing a transfer of the property in fact, that the wife acquired the title in the state of Alabama. In *Bradshaw v. Mayfield*, 18 Tex. 26, this court said: "Verbal sales and gifts between husband and wife ought not to be admitted, unless on clear and satisfactory proof that the property was divested out of the vendor, and vested in the vendee or donee." The case of *Avery v. Avery*, 12 Id. 54 [62 Am. Dec. 513], goes further perhaps, than any other decided by this court to maintain the right of the wife in this case. But in that case the husband, having removed from Georgia to the state of Louisiana, there had the title made to his wife, which the husband in this case declined to do, and it was on that title that her right was maintained. The equities of the wife in that case were as strong as in this; but they were not supposed to invest her with the title.

The wife's claim of title derives no aid from what subsequently transpired in Mississippi and Louisiana. In the former state, the husband proposed a disposition of the slave as his own property; and in the latter, although he seems to have contemplated asserting title in his wife if it should become necessary to protect the property from his creditor, yet when it was proposed to him to execute a deed to his wife, which he ought unhesitatingly have done if it was his *bona fide* intention to secure the property to her separate use, he declined to do so. In fine, the evidence of title relied on is of too equivocal, indeterminate, and unsatisfactory a nature to amount to proof sufficient to establish a right of separate property in the wife. Had the jury so found, their verdict must have been set aside as not warranted by the evidence. The error in the charge, therefore, becomes immaterial, since it cannot have operated to the prejudice of the defendants: *James v. Thompson*, 14 Tex. 463; *Whitson v. Smith*, 15 Id. 34; *Commercial Bank v. Jones*, 18 Id. 811; *Bradshaw v. Mayfield*, Id. 21; *Fisk v. Holden*, 17 Id. 408.

It is further insisted that the court erred in refusing instructions asked by the defendants, to the effect that the limitation in the will of the life estate of the widow, during her widowhood, is a condition in restraint of marriage, and therefore void.

The general result of the modern decisions in the English and American courts upon this subject is thus stated by Judge Story: "Conditions annexed to gifts, legacies, and devises in restraint of marriage are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held utterly void. And so if the condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to particular circumstances, that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration:" 1 Story's Eq. Jur., sec. 280.

But while conditions in restraint of marriage are held to be void, it is otherwise with limitations of the use of the thing given or bequeathed, until the donee or legatee shall marry. Such limitations of the use are not deemed to be in restraint of marriage, and are held valid. Thus it has been said: "We must, however, be careful not to confound limitations with conditions; for limitations may be good, notwithstanding they are seemingly in restraint of marriage; and were so by the civil as well as the common law. As, for instance, where the meaning of the testator is not to forbid marriage, but to grant the use of the thing bequeathed until the legatee shall marry: Swinburne on Wills, pt. 4, c. 12, sec. 6; or where the prohibition of marriage is not made conditionally by this word "if" (as I make thee my executor if thou dost not marry), by other words or adverbs of time; as when the testator willeth that his daughter or wife shall be executrix, or have the use of his goods so long as she shall remain unmarried. Agreeably thereunto are the laws of this realm of England, wherein there is a case that one of the kings of this realm did grant to his sister the manor of D, so long as she should continue unmarried; and this was admitted to be a good limitation in law, but not a condition:" Swinburne on Wills, pt. 4, c. 12, sec. 19; *per* Kennedy, J., in *Middleton v. Rice*, 6 Pa. L. Jour. 234; and see particularly *Commonwealth v. Stauffer*, 10 Pa. St. 350, 354, 357 [51 Am. Dec. 489], opinion by Chief Justice Gibson; 1

Roper on Legacies, 797 et seq., and notes; 1 Story's Eq. Jur., sec. 276-291, and notes; *Scott v. Tyler*, Hare & Wallace's Notes to White & Tudor's Lead. Cas. Eq., 71 Law Lib. 266-337; 1 Jarman on Wills, 698, and notes.

We deem it unnecessary in the present case to enter upon an examination of the numerous authorities upon this subject; for they are all (at least the modern authorities) agreed that where, as in this case, property is limited to a widow until marriage, and upon marriage then over, the limitation is good. "It is difficult," says Sir J. Wigram, V. C., "to understand how this could be otherwise, for in such a case there is nothing to give an interest beyond the marriage. If you suppose the case of a gift of a certain interest, and that an interest sought to be abridged by a condition, you may strike out the condition and leave the original gift in operation. But if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage:" *Morley v. Rennoldson*, 2 Hare, 580. The limitation in this case was unquestionably valid; the use of the property was determined by the marriage of the widow, and the court did not err in refusing the instruction to the effect that it was a condition in restraint of marriage.

It remains to inquire whether there was error in refusing to grant a new trial upon the affidavits of jurors. And there clearly was not. The generally received doctrine is, that the affidavits of jurors shall not be received to impeach their verdict. And for the obvious reason that it would open a door for tampering with jurors, and would place it in the power of a dissatisfied or corrupt juror to destroy a verdict to which he had deliberately given his assent under the sanction of an oath. The subject was very fully examined in the case of *State v. Freeman*, 5 Conn. 348; and after reviewing the authorities, the court concluded that "almost the whole legal world is adverse to the reception of the testimony in question [that of the jurors who tried the case], and on invincible foundations." In *Graham & Waterman on New Trials*, it is said: "It is admitted, notwithstanding a few adjudications to the contrary, that it is now well settled, both in England, and with the exception of Tennessee perhaps in every state of this confederacy, that such affidavits cannot be received, and we believe upon correct reasoning:" 3 *Graham & Waterman on New Trials*, 1429. The numerous cases there collected and reviewed confirm the observation. In Tennessee, where the affidavits of jurors are admitted to impeach their verdict, it is said they must be

received with great caution: *Sanders v. Fuller*, 4 Humph. 516. In Ohio, it is said, they are not in general admissible for that purpose, and can only be received under certain circumstances, where a foundation has been first laid by other evidence: *Farrer v. State*, 2 Ohio St. 54. The better opinion is, that they ought not in general to be admitted to impeach the verdict, and if received at all for that purpose, it ought only to be under special circumstances. The course of decision in this court has been decidedly to discountenance applications for new trials founded on the affidavits of jurors; and the consequence is, that few cases of this kind have occurred in our practice: *Kilgore v. Jordan*, 17 Tex. 341; *Mason v. Russell*, 1 Id. 726; *Campbell v. Skidmore*, Id. 475.

But if the affidavits were admitted in the present case, they show no ground for granting a new trial. The paper on which the jurors say, if before them, they would have returned a different verdict afforded not the slightest evidence of title, nor was there any reason for giving it the effect they proposed. Their affidavits show that they entirely mistake the character of the paper, and if allowed, would have given it an improper influence upon their deliberations.

On the whole, we are of opinion that there is no error in the judgment, and it is affirmed.

Judgment affirmed.

INVENTORY, EFFECT AS EVIDENCE OF TITLE IN PROBATE PROCEEDING: See *Dunham v. Chatham*, ante, p. 228, and note thereto 235.

CONDITIONS IN WILL IN RESTRAINT OF MARRIAGE, EFFECT OF: See *Coppage v. Alexander*, 38 Am. Dec. 153, and extensive note thereto 156-161; *Commonwealth v. Stauffer*, 51 Id. 489; *Dumey v. Schaeffer*, 69 Id. 422, and note.

AFFIDAVITS OF JURORS NOT ADMISSIBLE TO IMPEACH VERDICT: See *Conner v. Winton*, 65 Am. Dec. 721; *Wilson v. Berryman*, 63 Id. 246, and note collecting many other cases. The refusal to receive such affidavits is said to be the better practice: *Johnson v. State*, 27 Tex. 769, citing the principal case.

DRINKARD v. INGRAM.

[21 TEXAS, 650.]

COURT OF EQUITY WILL NOT RELIEVE PARTY against the consequences of his own laches.

COURT OF EQUITY WILL NOT RELIEVE PARTY against the fault or negligence of his attorney.

FRAUD IS DEFENSE WHICH IS COGNIZABLE AS WELL IN COURTS OF LAW AS OF EQUITY, and is considered even more odious than force.

JUDGMENT OBTAINED BY FRAUD cannot be made the basis of a recovery though it may have been rendered upon a just demand.

QUESTION OF FRAUD IN FACT IS WITHIN PROVINCE OF JURY, and a judgment rendered therein by the court is error, no matter how just.

SUIT by appellant to recover the amount of a judgment in his favor against the appellees in the circuit court of Alabama. The suit in Alabama was trover to recover a negro slave, or his value; two trials were had there. On the first, plaintiff recovered judgment, and defendant asked for and obtained a new trial, and at the succeeding term another trial was had and a verdict and judgment were rendered for plaintiff. The appellees in their answer set up, "that if any new trial was granted in the cause in Alabama, it was done without their consent, contrary to their wishes or instructions, and to defraud them;" and that they paid off the first judgment and costs to Thomas Smith, deputy sheriff, etc. They set up title to the negro in Mrs. E. Ingram, and say that the suit in Alabama, though in form of trover, was only intended to recover about seventy dollars damages for the services of a negro which had been hired by Drinkard of Mrs. Ingram, and which negro she had taken possession of before the expiration of the time for which he was hired, and that the judgment was obtained by fraud, combination, etc. Verdict and judgment for defendants.

J. C. Robertson, for the plaintiff in error.

Selman and Davis, for the defendants in error.

By Court, WHEELER, J. We are referred, on behalf of the appellant, to numerous decisions of the supreme court of Alabama and to decisions of other courts for the doctrine that, after judgment has been recovered at law, a court of chancery will not interfere to afford relief against the judgment on account of matter which would have been a good defense at law, unless the defendant in the judgment was ignorant of the fact in question, or was prevented from availing himself of the defense by fraud or accident or the act of the opposite party, unmixed with negligence or fault on his part; that the party seeking the aid of a court of equity, in such a case, must show that his failure to make his defense was not attributable to his own neglect or want of diligence.

Of the correctness of this doctrine there can be no question. A court of equity will interpose in no case to relieve a party against the consequences of his own negligence or laches.

It is also true that courts, in disposing of applications for

new trials, where the court, whether a court of law or equity, proceeds upon equitable principles, will refuse the application on similar grounds. Neither will a court of equity relieve a party against the fault or negligence of his attorney; as in the case cited, where the attorney went into the trial in the absence of the complainant and unprepared, and suffered a verdict to go against him, the court refused to relieve the complainant from the judgment caused by the fault of the attorney, leaving him to seek his redress against the attorney: *Barrow v. Jones*, 1 J. J. Marsh. 470.

These are familiar doctrines, which this court cannot fail to recognize, and which have often been enforced by its decisions—doctrines which no one will controvert. But they have no application to this case. These defendants are not seeking the aid of a court of equity to relieve them against the judgment recovered against them in the state of Alabama. They do not invoke the interposition of the chancellor in Alabama or in Texas to enjoin the collection of a judgment recovered against them by reason of their own negligence or that of their attorney. They are not beseeching a court of equity or law to reopen the merits of the judgment and grant them a new trial. They are not complainants seeking to set aside a judgment; but they are defendants resisting a recovery against them in a suit brought upon the Alabama judgment, on the ground that it was obtained by fraud. Theirs is a merely defensive attitude upon the record; and the ground they assume is that the plaintiff is not entitled to any recovery upon his judgment because it was fraudulently obtained. There is no such doctrine applicable to their case as that to entitle a party to interpose to an action upon a judgment this defense he must have been guilty of no laches. The right to urge their defense against the judgment has no such qualification annexed to it. Fraud is a defense which is cognizable as well in courts of law as of equity; and it is said it is even more odious than force; it annuls all contracts, and even the most solemn acts and judgments of courts which are infected with it. If it be shown that the judgment was obtained by fraud, it is scarcely necessary to say it cannot afford the basis of a recovery, though it may have been rendered upon a just demand. If fraudulently obtained, whether upon a demand which was well or ill founded, is immaterial, as respects the plaintiff's right to recover upon it in this action, it cannot authorize or support a recovery for the sum for which judgment might have been

rightfully rendered for the plaintiff. The justice or injustice of the plaintiff's demand is only material in this suit in so far as it may conduce to the proof or disproof of the alleged fraud in obtaining the judgment. Whether it was so obtained, was the question for decision by the jury. If the charge of the court had left the question to their decision, the only remaining inquiry would have been whether their verdict was warranted by the evidence. But as the case is presented, that question does not at present arise. The court by its charge drew for the jury the conclusion of fraud from the evidence and virtually decided the question, instead of submitting it to their decision. The conclusion of the court may have been quite just; but it should have been left to the jury to draw their own conclusions for themselves from the evidence, especially upon a question of fraud in fact, which it is peculiarly within their province to decide. The objection that the court charged upon the weight of evidence we therefore think well taken. And as the judgment, for this error, must be reversed and the cause be remanded for a new trial, it does not become necessary to inquire respecting the sufficiency of the evidence. It may be different upon another trial. The judgment is reversed, and the cause remanded.

Reversed and remanded.

LACHES AS BAR TO RELIEF IN EQUITY: See *Johnson v. Toulmin*, 52 Am. Dec. 212; *Smith v. Thompson*, 54 Id. 126; *Marshall v. Means*, 56 Id. 444.

REED v. SAMUELS.

[23 TEXAS, 114.]

VEHEMENT ATTACHMENT.—Debtor who comes into court to complain against his creditor, for injuriously suing out an attachment against him, must come with clean hands, and juries may well require clear and full proof that the creditor has violated the law, when the complaining debtor is, in the first instance, guilty of fraud or wrong.

WHERE ATTACHMENT IS SIMPLY WRONGFULLY SUED OUT, ONLY ACTUAL DAMAGES CAN BE RECOVERED; where it is sued out maliciously and with intention to harass and injure the defendant, exemplary damages may be awarded.

ERROR from Travis county. The opinion states the case.

Hancock and West, for the plaintiff in error.

Smith and Campbell, for the defendant in error.

By Court, BELL, J. We do not deem it necessary to the proper determination of this cause to notice all the errors assigned and argued by counsel. The merits of the case lie within a very narrow compass. The evidence shows clearly that the plaintiff in error violated his contract to deliver eleven hundred and twenty pounds of hides, intrusted to him by defendants in error, to be delivered to their consignee at Port Lavaca. The plaintiff in error, Reed, does not attempt to explain his failure to comply with his contract for the delivery of the hides at Port Lavaca, but complains of the great wrong and injury done him by the plaintiffs, in the court below, in suing out the attachment.

Pleas in reconvention, for damages for the malicious and vexatious suing out of attachments, have become very common in the courts of this state, insomuch that a party can seldom resort to the remedies which the law gives him for the collection of his just demands without finding himself involved in a cross-action, to defend which may cost him much more than the debt which he sought to collect. The courts of the country cannot lend an unwilling ear to defendants who present such issues for investigation. If a creditor has been not only harsh and oppressive, but regardless of the rights of his debtor, and has violated the law, in the too eager pursuit of his demand, then the injured debtor may properly apply to the courts for redress. But when a debtor comes into court to complain against his creditor, it is well for him to come with clean hands; and juries may well require clear and full proof that the creditor has violated the law, when the complaining debtor is, in the first instance, guilty of fraud or wrong.

In this case, the judge instructed the jury very clearly and fairly. It is assumed by the counsel for the plaintiff in error that the judge instructed the jury that the defendant below could not recover on his plea in reconvention unless the attachment had been sued out maliciously. The judge did not so instruct the jury. The charge stated clearly the distinction between the wrongful suing out of an attachment and the malicious suing out of an attachment. The jury were told that if the suing out of the attachment was only wrongful, then they could only find a verdict for the defendant on his plea, for the amount of the actual damages which he had sustained. They were further instructed that exemplary damages might be awarded if they believed, from the evidence, that the plaintiffs below had sued out either of the attachments maliciously, and

with intention to harass and injure the defendant. The whole charge to the jury was substantially correct, and it may well be supposed that the judge did not regard the case, as presented to the jury, as one that called for any very elaborate statement of the law on the subject of the liability of those who improperly seek the remedy by attachment for the collection of their debts.

We see nothing in the case which requires us to disturb the judgment, and therefore it is affirmed.

Judgment affirmed.

TO MAKE ACT OF CREDITOR IN SUING OUT ATTACHMENT WILLFULLY WRONG, and entitle the debtor to exemplary damages, it is not enough to show that the attachment was wrongfully sued out, but it must further appear that the creditor procured the attachment without any reasonable ground to believe the truth of the matters stated in the affidavit, and with the intention, design, or set purpose of injuring the debtor: *Rover v. Webster*, 66 Am. Dec. 96, and note collecting prior cases in this series upon the question of malicious attachments and actions therefor.

THE PRINCIPAL CASE IS CITED to the point that if, in suing out an attachment, the plaintiff was not actuated by malice towards the defendant, nor other motive than a desire to secure the payment of the debt sued on, the rule of damages, if the attachment be dissolved, is the damages actually sustained, in *Clark v. Wilcox*, 31 Tex. 322; *Brown v. Tyler*, 34 Id. 168; *Hughes v. Brooks*, 36 Id. 379. Where the suing out and levy of a writ of attachment is malicious, exemplary damages can be awarded; where it is only wrongful, without malice, actual damages only can be awarded: *Harris v. Finberg*, 46 Id. 96; *Show v. Brown*, 41 Id. 449.

BARNETT v. CARUTH.

[23 TEXAS, 172.]

JUDGMENT IS ERRONEOUS FOR UNCERTAINTY WHICH DECIDES that plaintiffs do recover of defendant "their debt, damages, and costs," without giving the amount or referring to the verdict, although the verdict in which the amounts are given is recited in the entry.

VERDICT WHICH DOES NOT REFER TO MORTGAGE IN ACTION UPON NOTES AND TO FORECLOSE MORTGAGE, securing the same, leaves it doubtful if the jury passed upon the mortgage, and is defective.

SUIT by defendants in error against plaintiffs in error upon a note, and to foreclose a mortgage securing the same. The entry of the proceedings had at the trial is substantially as follows: Came the parties and a jury, and the latter, after hearing the evidence, the argument of counsel, and the charge of court, returned a verdict for plaintiffs for the principal and interest of his note, in the sum of one thousand three hundred

and forty-seven dollars and forty-four cents. And it further appearing to the satisfaction of the court that defendants had made and delivered to plaintiffs a certain mortgage, or certain described lands to secure the money and interest due on said note, "it is further ordered, adjudged, and decreed by the court, that the plaintiffs do recover of the defendants for their debt, damages, and costs; that such mortgage be foreclosed," etc.

Guess, for the plaintiffs in error.

Good, for the defendants in error.

By Court, ROBERTS, J. The judgment is erroneous, because it is uncertain what is the amount of the recovery. After reciting the verdict, etc., it reads: "It is ordered, adjudged, and decreed by the court, that the plaintiffs do recover of the defendants for their debt, damages, and costs;" entirely omitting the sum adjudged, and making no reference to the verdict, by which it could be rendered certain, and thereby be complete within itself: *Spiva v. Williams*, 20 Tex. 442; *Roberts v. Landrum*, Id. 471.

The parties appeared and tried the case before a jury, who returned a verdict for the plaintiff, for the principal and interest of the note, without any express reference to the mortgage. This at least leaves the matter doubtful, upon the most liberal construction, whether or not the jury passed upon the mortgage which was foreclosed. Therefore, it does not present such a case as this court will undertake to correct, by rendering the judgment here. The judgment is reversed and remanded.

Reversed and remanded.

AMOUNT DUE UPON JUDGMENT, and for which property is held liable, must be fixed before the sale: *Cohen v. Carroll*, 45 Am. Dec. 267. In *Stowers v. Milledge*, 63 Id. 434, the certainty required in a judgment is discussed. In *Smith v. Miller*, 14 Id. 418, it was held that a judgment entered in figures or for "legal costs," without specifying the amount, was erroneous, and would be reversed.

THE PRINCIPAL CASE IS CITED in *Stafford v. King*, 30 Tex. 257-276, where the court say that the object of the verdict of a jury is to respond to the issues made in the pleadings, and supported by the evidence. The judgment must be a conclusion of law from the facts found, and all must be so certain that the ministerial officers may execute the judgment without further directions.

BASSETT v. GARTHWAITE.

[22 TEXAS, 230.]

MAKER OF NEGOTIABLE NOTE CANNOT BE CHARGED AS GARNISHEE OF PAYEE, so long as the note is still current as negotiable paper.

MAKER OF NEGOTIABLE NOTE CANNOT BE CHARGED AS GARNISHEE OF PAYEE OF NOTE before its maturity, and he cannot be charged as such after the maturity of the note, unless it be affirmatively shown that at the time of serving the writ the note was the property of the payee.

ANSWER OF GARNISHEE IS NOT EVIDENCE of the facts therein stated against intervenors in a contest between them and the garnishors.

WHERE ONE IS SOUGHT TO BE CHARGED AS GARNISHEE OF PAYEE OF PROMISSORY NOTE, and a third party intervenes claiming property in the note, the presumption is that it came into the latter's possession before its maturity, and the plaintiff must show affirmatively not only that he did not acquire it before maturity, but that it was in fact the property of the payee at the time of the service of the writ of garnishment.

GARNISHMENT proceeding. The opinion states the facts.

Sayles, for the appellants.

J. D. and D. C. Giddings, for the appellees.

By Court, **BELL, J.** The appellees in this case were judgment creditors of Sheegog & Wilson. They procured the issuance of writs of garnishment against the firm of Bassett & Bassett, attorneys at law, and also against one W. A. Browning. Browning answered that he was not indebted to the firm of Sheegog & Wilson, etc. He further answered that in the month of November or December, 1855, he rented a house and lot from Sheegog and executed his note for the rent, amounting to the sum of one hundred and twenty-five dollars; that he did not recollect whether the note was made payable to Sheegog or to Bassett & Bassett; and that the note was due on the first of January, 1857. He answered that in January, 1857, J. Bassett, one of the firm of Bassett & Bassett, told him the note was in the hands of Sheegog; and that in February, 1857, Sheegog told him the note was in the hands of Bassett & Bassett. He prayed the judgment of the court to whom he should make payment. The writ of garnishment to Browning issued on the first day of January, 1857, and was served on the sixth of the same month. Bassett & Bassett also answered the writ of garnishment against them. The plaintiffs contested the answers of the garnishees, under the provisions of the statute: Hart. Dig., art. 50.

Bassett & Bassett intervened, by leave of the court, alleging that they were the owners and holders of the note described

in the answer of the garnishee, Browning; and they prayed judgment against Browning for the amount of the note, etc. The plaintiffs answered the petition of the intervenors, and alleged that the note was still the property of Sheegog.

The court instructed the jury as follows: "If you believe from the evidence that the note given by Browning was the property of Sheegog at the time of the service of the writ of garnishment, on the fifth day of January, 1857, you will find for the plaintiffs; that any transfer of the note, after the same became due; and after the service of the writ of garnishment, would not defeat the plaintiffs' right to the proceeds of the note; that the answer of Browning is evidence before the jury. If you believe, from the evidence, that the note sued on belongs to Hart & Co., and that they sue on it in the name of Bassett & Bassett, you will find for Bassett & Bassett the amount of the note and interest."

The note, described in the answer of the garnishee Browning, was read in evidence; also the answers of all the garnishees. Bassett & Bassett testified that after the writs of garnishment had been sued out (as they believed) the note was sent to them for collection by Hart & Co., of Houston; that they receipted to Hart & Co. for it; that Sheegog was then a clerk for Hart & Co.; and that they were Sheegog's attorneys. Jefferson Bassett also stated that Browning was mistaken in saying that witness had informed him, in the month of February, 1857, that the note was in the hands of Sheegog at that time, for witness did not know the fact.

There was a verdict and judgment for the plaintiffs. There was a motion for a new trial, on the ground that the court had erred in giving charges asked by plaintiffs; that the jury found contrary to the charge of the court, to the law, and to the evidence; and that the jury found for the plaintiffs, without evidence. The motion for new trial was overruled.

There are few subjects properly belonging to the law merchant that present to the courts more embarrassing questions than the general subject of the liability of the makers of mercantile paper, as garnishees of the payees of such paper. Even in reference to non-negotiable notes difficulties have arisen, under different circumstances, in determining the liability of the makers as garnishees of the payees. But as is well remarked by Mr. Drake, in his treatise on the law of attachment, sec. 577: "Any difficulties which, under any system, attend the garnishment of the maker of an unnegotiable note

are trivial when compared with those which beset a like attempt in the case of a negotiable note."

After treating of the general and well-established principles which lie at the foundation of the inquiry into the liability of the maker of a negotiable note as garnishee of the payee, Mr. Drake states the following conclusion: "The maker of a negotiable note cannot be charged as garnishee of the payee, under an attachment served before the maturity of the note, unless it be affirmatively shown that, before the rendition of the judgment, the note had become due, and was then still the property of the payee."

It may be considered as the settled law of this court that the maker of a negotiable note cannot be charged as the garnishee of the payee, so long as the note is still current as negotiable paper: *Wybrants v. Rice*, 3 Tex. 458; and the case of *Iglehart v. Moore*, 21 Id. 501, decided at Tyler term, April, 1858.

This subject is discussed by Mr. Sayles, in his late valuable work on practice. From an examination of all the authorities, that gentleman deduces the following rule, which we believe to be the correct one: "The maker of a negotiable note cannot be charged as garnishee of the payee of the note before its maturity; and he cannot be charged as such after the maturity of the note, unless it be affirmatively shown that at the time of serving the writ the note was the property of the payee:" Sayles's Practice, sec. 344.

It is also stated by Mr. Drake to be a rule, from which there is no dissent, "that it is impossible to charge the garnishee as a debtor of the defendant, unless it appear affirmatively that at the time of the garnishment the defendant had a cause of action against him for the recovery of a legal debt due or to become due by the efflux of time."

In the application of these principles to the case before us, we are met at the outset of the attempt by the fact that the garnishment in this case did not issue until the very day of the maturity of the note, and was not served on Browning, the maker of the note, until the fifth day after its maturity. It was incumbent on the plaintiffs, notwithstanding the service of the garnishment after the maturity of the note, to show affirmatively that the note was the property of Sheegog at the time of the service of the garnishment; because it might very well be that the note had passed into the hands of a *bona fide* holder before the service of the garnishment, and even before the maturity of the note; and unless it was made to appear to

the court that the note had not been transferred by Sheegog before maturity, or before service on Browning of the writ of garnishment, the court could not declare, by its judgment, that Browning appeared to be indebted to Sheegog.

What, then, was the evidence in this case? The answer of Browning stated the fact of the execution of the note, and the time at which it matured. It also stated that in January Bassett told the garnishee that the note was in the hands of Sheegog, and that in February Sheegog told him that the note was in the hands of Bassett & Bassett. These statements, in themselves, had no definite signification, admitting them to be true. The writ of garnishment was served on Browning on the sixth day of January. It might have been true that the note was in the hands of Sheegog "some time in January," and yet not true that it was in his hands at the time of the service of the garnishment. It might also have been true that the note was in the hands of Bassett & Bassett in February; but it did not at all follow, from that circumstance, that the note was the property of Sheegog in February, or at the time of the service of the writ of garnishment. Upon the answer, then, of the garnishee, Browning, the court could not properly have rendered a judgment for the plaintiffs, because it did not affirmatively appear that the note was the property of Sheegog at the time of the service of the garnishment.

But what was the effect of the answer of the garnishee, Browning, after it was contested and after Hart & Co. had intervened through the agency of Bassett & Bassett?

When Browning answered the garnishment according to the requirement of the law, his answer, of course, was evidence against himself. When it was contested by the plaintiffs, it was evidence against them, until overborne by competent testimony. But was it evidence against Hart & Co. when they intervened in the suit and asserted their property in the note? Surely not. It was proper for Hart & Co., when they had information of the proceedings against Browning, to intervene and assert their rights. But their rights would not have been at all affected, much less concluded, if they had not intervened. Let us suppose, then, that instead of intervening in the suit of the appellees against Browning, Hart & Co. had brought an independent suit against Browning on the note. It would not be contended that, in such independent action, Browning could give evidence for himself against Hart & Co. No more, then, can he do it when Hart & Co. intervene in the suit of the plaintiffs against him.

From this we conclude that the court erred in instructing the jury that the answer of Browning was evidence before them. The real controversy, on the trial, was between Hart & Co. and the original plaintiffs, Garthwaite, Griffin, & Co. Browning had stated all that was within his knowledge, fully and fairly, as it was his duty to do; and his only concern in the suit was to ascertain to whom he could lawfully make payment of his debt. The instruction of the court, then, must have been taken by the jury to refer to the real controversy between Hart & Co. and the plaintiffs, and to have a bearing on that controversy. That the jury so understood the instruction is manifest, for aside from the answer of Browning there was no particle of evidence that the note was the property of Sheegog at the time of the service of the garnishment. When Hart & Co. came into court and asserted their property in the note, and presented the note to the court, the presumption of law was that the note had come into their hands before its maturity, and it remained for the plaintiffs, Garthwaite, Griffin, & Co., to show affirmatively, not only that the note did not pass into the hands of Hart & Co. before maturity, but that it was in fact the property of Sheegog at the time of the service of the writ of garnishment. This they failed to do. We think there was error in the charge of the court that Browning's answer was evidence before the jury, and that the motion for new trial should have been sustained. The judgment is reversed, and the cause remanded.

Reversed and remanded.

MAKER OF NOTE, WHEN CHARGEABLE AS GARNISHEE OF PAYEE.—This subject is discussed in *Emerson v. Patridge*, 62 Am. Dec. 617; *Davis v. Paolette*, Id. 690; *Walters v. Washington Ins. Co.*, 63 Id. 451, and cases collected in notes thereto.

THE PRINCIPAL CASE CAME BEFORE THE COURT in another form, and the doctrines therein laid down were approved: *Garthwaite v. Hart*, 24 Tex. 316.

PECK v. CITY OF AUSTIN.

[22 TEXAS, 261.]

CITY, BY GRANTING LICENSE TO CONDUOT BUTCHER BUSINESS, AND LEASING BUTCHER'S STALL TO INDIVIDUAL in consideration of the payment of a rent and license tax, does not thereby contract to secure him against unlicensed competition; and its failure to enforce ordinances against carrying on the business without a license cannot be used as a defense to an action to recover the amount of the rent and license tax.

MUNICIPAL CORPORATION IS NOT LIABLE FOR NON-ACTION OF ITS OFFICERS, when such non-action is contrary to the will of the corporation, as expressed in its ordinances.

AN ordinance of the city of Austin provided for a market-house and grounds, and made rules for the regulation thereof. It made provision for renting stalls therein to persons carrying on the business of butchering, the same to be let to the person paying the highest price therefor; also for the issuance of a license to such person. By this ordinance it was made penal for any other person to carry on the business of butchering, to slaughter cattle within the city limits, or to sell meat, game, etc., within such limits. It was made the duty of the mayor, upon being informed of a violation of this ordinance, to cause the arrest and prosecution of the offender. The opinion states the remaining facts.

Sneed and Walton, for the plaintiff in error.

Smith and Campbell, for the defendant in error.

By Court, ROBERTS, J. This is an action brought by the city of Austin against Peck and De Normandie, on an obligation given for the rent of a butcher's stall in the city market, bid off by Peck, and occupied by him for one year.

Defendants pleaded that the city passed an ordinance establishing the market, and prescribing the mode of selling butchers' meat in the city, protecting persons who might purchase a license, as did Peck, from competition with unlicensed persons, by inflicting certain penalties upon the latter, and defining the manner in which such penalties should be enforced by the officers of the city. The plea alleged, further, that the said officers willfully neglected their duty, and did not punish certain persons who violated the provisions of the ordinance by selling without license, although the same came to the knowledge of said officers; by which he was not protected in his privilege; and that thereby the consideration of the obligation sued on, for one hundred and fifty dollars, had wholly failed. He alleged that he had paid fifty-five dollars in advance, which was ample compensation for the use of the stall in the market which he had occupied. This plea, being excepted to, was held to be no defense to the action.

This defense is based upon the supposition that the city, acting in its corporate capacity in establishing and regulating a market, by its ordinance, had contracted with Peck to secure him against such unlicensed competition in every event.

A slight consideration of the subject will show that this cannot be maintained.

The city of Austin is a municipal government, whose powers are defined and limited by the terms of its charter of incorporation. The exertion of its powers by its constituted authorities, in prescribing rules of police, and imposing and inflicting penalties for their infraction, is but a mode of exerting the power of the government of the state, within the limits of the city. It is a government within a government. Still they are the same; the one being the execution of the will of the other, within certain established boundaries of power and in a certain locality.

This ordinance, then, no more embodies a contract of full indemnity against such unlicensed competition in selling butchers' meat in the city than the public act of the legislature of the state establishing and regulating the license for retailing spirituous liquors would indemnify against retailing without license. In both cases there is an undertaking to protect the privilege granted, *sub modo*. The same undertaking exists to protect all our rights, which the government assumes to protect by the infliction of penalties on those who violate them. The non-feasance or malfeasance of the officers to whom is intrusted the duty of punishing such violators of our rights cannot be recognized in a court of law as absolving us from the duties of citizenship.

Such corporation, though a municipal government, and therefore public, may also occupy towards individuals the position of a private corporation, and be liable upon its contracts, or for the wrongful acts of its officers, done under its authority, and in pursuance to its will, expressed or implied. Such rule, if applicable to this case, could not be here enforced; because the act or non-action of the officers complained of was contrary to the will of the corporation as expressed in the ordinance; which continued in full force during the whole year: *Thayer v. Boston*, 19 Pick. 511 [31 Am. Dec. 157]; *Martin v. Mayor of Brooklyn*, 1 Hill (N. Y.), 545; *Angell & Ames on Corp.*, c. 9, secs. 2, 7; c. 8, secs. 3, 1; *Bailey v. Mayor etc. of New York*, 3 Hill (N. Y.), 531 [38 Am. Dec. 669].

We are of opinion that the plea was no bar to the action.

Judgment affirmed.

MUNICIPAL CORPORATION IS NOT GENERALLY LIABLE FOR NEGLIGENCE OF ITS OFFICERS: See *Dargan v. Mayor etc. of Mobile*, 70 Am. Dec. 505; *City Council v. Gilmer*, Id. 562; *Patch v. City of Covington*, 66 Id. 186; *Mitchell v. Rockland*, Id. 252, and cases in notes. The principal case is cited in *Keller*

v. *Corpus Christi*, 50 Tex. 628, where the court quote the following language from the opinion: "The exertion of its powers by its constituted authorities in prescribing rules of police . . . is but a mode of exerting the power of the government of the state within the limits of the city. It is a government within a government. Still they are the same; the one being the execution of the will of the other, within certain established boundaries of power and in a certain locality."

BRANTLEY v. THOMAS.

[22 TEXAS, 270.]

WHERE SALES OF GOODS ARE MADE BY SAMPLE, THERE IS IMPLIED WARRANTY that the goods delivered shall correspond with the sample.

WHERE GOODS ARE SENT BY ONE MERCHANT UPON ORDER OF ANOTHER, there is an implied warranty that the goods sent are such as were ordered; where goods are so sent without a special order, but upon a general engagement to forward goods, there is an implied warranty that all goods sent are valuable and merchantable.

PURCHASER OF GOODS MUST ATTEND TO THOSE QUALITIES OF ARTICLES HE BUYS which are supposed to be within the reach of his observation and judgment, such as where the articles are equally open to the inspection of both parties; but this rule does not apply where the purchaser has ordered goods of a certain character, and relies on the judgment of the seller, or where goods of a certain described quality are offered for sale, and when delivered do not answer the description given in the contract.

DOCTRINE OF CAVEAT EMPTOR IS FOUNDED UPON IDEA THAT PURCHASER SEES WHAT HE BUYS, and exercises his own judgment. Where he has no opportunity of exercising this judgment, but relies upon the judgment of the party with whom he deals, the tendency of the modern decisions is to imply a warranty of quality.

UNDER PLEA OF TOTAL FAILURE OF CONSIDERATION, DEFENDANT MAY SHOW PARTIAL FAILURE, in Texas. This is not the rule in England, and in some of the states of the Union, but it is so here by virtue of the statute.

RETURNING GOODS IN CASE OF BREACH OF WARRANTY.—Where there is an express or implied warranty, the vendee of goods may show a partial failure of consideration, in defense of an action against him for the purchase-money, without returning the goods; but if he would rescind the sale and recover back the purchase-money, he must within a reasonable time return the goods, or offer to return them; unless the goods are wholly worthless, in which case the vendee is never under obligation to either return or offer to return them.

SUIT upon a promissory note given in payment for a quantity of tobacco, sold to appellant by the appellee's agent. Appellant pleaded a total failure of consideration in this: that the tobacco sent to his order by appellee from New York was wholly worthless, rotten, and unsalable; that it was entirely different from the kind ordered from him; that at the time of the sale

appellee's agent represented the tobacco as a superior article; that he exhibited a sample which was entirely different from the tobacco sent; that by reason of such representations and such sample he was induced to make the purchase; and that the note sued on was given long before the delivery of the tobacco. The court instructed the jury that unless they found the tobacco to have been entirely worthless, it was the duty of the defendant, within a reasonable time after he discovered the poor quality of the goods, to have offered to return it, in order to maintain his defense of failure of consideration.

Parker, for the appellants.

By Court, BELL, J. There are no questions about which the decisions of the courts of this country and of England have been more various than they have been concerning those questions which so often arise out of the doctrine of implied warranties. And even upon the question of warranty itself, the decisions are extremely contradictory. In cases of express warranty few difficulties are encountered, and the rules of law are sufficiently certain and fixed. The difficulties, of which the books are full, arise in cases where the questions are, whether there is an implied warranty or not, and what are the respective rights and duties of vendors and vendees in such cases. The old rule, and the general rule, as stated in the books, is, that a fair price implies a warranty of title, but that as respects the quality of the article sold the seller is not bound to answer. This rule, however, has received certain modifications, which have been generally recognized by the courts. One of these modifications, for example, is, that where goods are sold by sample, there is an implied warranty that the bulk of the goods delivered shall correspond with the sample exhibited. This general subject is fully discussed in 2 Kent's Com. 473-481, and in the notes to the text; also in Story on Sales and Parsons on Contracts.

It would be an unnecessary labor, and an improper consumption of time, in the midst of the mass of business which now presses upon the court, to review all the cases which are cited, and partially discussed, by the authors above named. We can merely state the conclusions of those learned writers, and endeavor, from a few general considerations, to ascertain the law applicable to the present case. In stating the general rule, Chancellor Kent says that "the common law very reasonably requires the purchaser to attend, when he makes his

contract, to those qualities of the article he buys which are supposed to be within the reach of his observation and judgment, which it is equally his interest and his duty to exert." He then quotes the case of *Seixas v. Woods*, 2 Cai. 48 [2 Am. Dec. 215], and the case of *Swett v. Colgate*, 20 Johns. 196 [11 Am. Dec. 266], where the general rule was enunciated, "that if there was no express warranty by the seller, and no fraud on his part, the buyer, who examines the article himself, must abide by all losses arising from latent defects, equally unknown to both parties." The learned author adds, "that the rule fitly applies to the case where the article was equally open to the inspection and examination of both parties, and the purchaser relies on his own information and judgment, without requiring any warranty of the quality. But," he adds, "the rule does not reasonably apply to those cases where the purchaser has ordered goods of a certain character, and relies on the judgment of the seller; or where goods of a certain described quality are offered for sale, and when delivered, they do not answer the description directed, or given in the contract. They are not the articles which the vendee agreed to purchase; and there is an implied warranty that the article shall answer the character called for, or be of the quality described, and salable in the market, and under that denomination."

Without pursuing this branch of the subject further, we may assume, as a correct rule, deducible from the authorities, that where sales are made by sample there is an implied warranty that the goods delivered shall correspond with the sample. And where goods are ordered by one dealer, and sent by another, there is an implied warranty that the goods sent shall correspond to the order, or that they are merchantable, and suited to the market where they are to be sold.

The rule of *caveat emptor* is founded in the idea that the purchaser sees what he buys, and exercises his own judgment; and the strong tendency of the modern decisions is to imply a warranty of quality in all cases where the purchaser has no opportunity to exercise his own judgment, but relies on the judgment of the party with whom he deals. If goods are sent, upon order, by a New York merchant to a Texas merchant, the law will imply a warranty that the goods sent are such as were ordered; or if goods are sent by a New York merchant to a Texas merchant without a special order, but upon a general engagement to forward goods, the law will imply a warranty that all goods sent are valuable and merchantable.

We conclude, then, that in this case, whether the sale was by sample or not, there was an implied warranty of the tobacco.

The next question is, whether or not the appellants had the right to plead and prove a partial failure of consideration, without an offer to return the tobacco. The plea, in this case, was a plea of total failure of consideration. But under this plea, the defendants might show a partial failure of consideration, as has been often decided by this court.

In England a party is not permitted to show a partial failure of consideration in a suit on a bill of exchange, though he may show a total failure of the consideration: 2 Kent's Com. 473, and cases cited in the note. The same rule has obtained in some of the states of this Union, and is yet adhered to by the courts; though, in most of the states, statutory regulations exist, authorizing parties to plead failure of consideration, either in whole or in part.

In England, and in those states of our Union where a party is not permitted to plead a partial failure of consideration in an action on a note or bill of exchange, many cases will be found which assert this doctrine; but the principle on which these decisions are based has no application in this state, where our statute expressly authorizes defendants to plead a partial failure of consideration: Hart. Dig., art. 2527.

We believe the rule to be established, by the weight of modern authority, that in all cases where there is either an express or an implied warranty the vendee of goods may show a partial failure of consideration, in defense of an action against him for the purchase-money, without returning the goods: See 1 Parsons on Cont. 473, 474, and the cases there cited; 2 Kent's Com. 474, and the cases cited in the note.

If the vendee of goods, in cases where there is either an express or an implied warranty, would rescind the sale, and recover back the purchase-money, he must, within a reasonable time, return the goods, or offer to return them, unless, indeed, the goods are wholly worthless; in which latter case the vendee is not obliged to return them, or to offer to return them, before he can sue to recover back the price, or defend against an action for the price: 2 Kent's Com. 480, and cases cited in the note; Story on Cont., p. 931, sec. 844 a; *Chisty v. Cummins*, 3 McLean, 386.

We conclude that there was error in the charge of the court, for which the judgment must be reversed, and the cause remanded for another trial, which is accordingly done.

Reversed and remanded.

SALES BY SAMPLE, WARRANTY IMPLIED FROM: See *Salisbury v. Stainer*, 32 Am. Dec. 437; *Moses v. Meade*, 43 Id. 676; *Fraley v. Bispham*, 51 Id. 486; *Beirne v. Dord*, 55 Id. 321; *Fuller v. Cowell*, 58 Id. 676, and notes.

WARRANTY OF FAIR AND MERCHANTABLE QUALITY IS IMPLIED from executory contract to sell and to deliver at a future date, and this warranty is not waived by the fact of receipt and acceptance of the merchandise, unless an opportunity to examine it has been afforded: *Babcock v. Trice*, 68 Am. Dec. 560, and note. Upon the question of implied warranty of quality in sale of chattels, see *Dickson v. Jordan*, 53 Id. 403; *Beirne v. Dord*, 55 Id. 321; *Wetherill v. Neilson*, 59 Id. 741.

EXECUTORY CONTRACT OF SALE MUST BE FILLED BY GOOD LAWFUL MERCHANDISE of suitable quality and kind. The rule is *caveat venditor*, not *caveat emptor*. If the vendor sues after being notified of the defects, his recovery, if at all, must be on a *quantum meruit* only: *Howard v. Hoey*, 35 Am. Dec. 572, and note; *Getty v. Rountree*, 54 Id. 138, and extensive note.

VENDEE MAY RECoup HIS DAMAGES FOR BREACH OF WARRANTY OF QUALITY in an action by the vendor on a promissory note given by the vendee for the price: *Getty v. Rountree*, 54 Am. Dec. 138, and note. Recoupment of damages may be allowed under plea of the general issue: *Babcock v. Trice*, 68 Id. 560, and note.

TO RESCIND CONTRACT OF PURCHASE, VENDEE MUST RETURN the property, unless it be entirely worthless to both parties: *Perley v. Balch*, 34 Am. Dec. 56; *Wintz v. Morrison*, 67 Id. 658.

THE PRINCIPAL CASE IS CITED in *Whittaker v. Heustis*, 29 Tex. 358, to the point that in every sale of goods by sample there is an implied warranty that the bulk of the goods delivered shall correspond with the sample.

BELL COUNTY v. ALEXANDER.

[23 TEXAS, 260.]

MOTION FOR NEW TRIAL IS NOT NECESSARY to entitle plaintiff in error to a revision of a judgment, where a jury trial had been waived, and the case submitted to the court.

IN CONSTRUCTION OF WILL, INTENTION OF TESTATOR is the great object of inquiry, and this intention must not be defeated because he failed to clothe his ideas in technical language.

QUANTITY OF INTEREST IN LAND CONVEYED BY WILL.—Rules of the common law with respect to the quantity of interest conveyed by a will do not apply in Texas, where the statute provides that where an estate in lands is created by will, it will be deemed to be an estate in fee-simple if a less estate be not limited by express words.

WORDS IN WILL TO PASS ESTATE IN LANDS—QUANTITY OF ESTATE PASSED.—In a will, by employing the words "I wish the county in which I die and am buried to have and enjoy, for the benefit of public schools, two thirds of the land in the county I am buried in," taken in connection with the words "my land" and "the land I own," used in other parts of the will, show an intention on the part of the testator to devise an estate in lands, and there being no words limiting its quantity, will be held to convey an estate in fee-simple.

AT COMMON LAW, ESTATE IN LANDS CREATED BY WILL WILL BE ENLARGED TO AND HELD TO BE AN ESTATE IN FEE-SIMPLE, where the land is charged with a trust which cannot be performed, or where the will directs an act to be done which cannot be accomplished, unless a greater estate than one for life be taken.

CORPORATION HAVING CAPACITY TO TAKE AND HOLD PROPERTY MAY TAKE AND HOLD IT UPON TRUST to the same extent as a private person. If the trust be repugnant to or inconsistent with the purposes for which the corporation was formed, this may be a ground for not compelling it to execute it, but it will not in any wise impair the trust, but will simply require a new trustee to be substituted by the proper court.

COUNTY, BEING EMPOWERED TO TAKE, HOLD, AND DISPOSE OF PROPERTY for municipal purposes, and such other purposes as subserve the public good, although a public corporation, has the same capacity in this respect and to this extent as a private corporation, to take and hold property in trust.

COUNTY HAS CAPACITY TO ACQUIRE ESTATE IN LANDS BY GRANT OR DEVISE. IN CONVEYANCE IN TRUST TO COUNTY "FOR BENEFIT OF PUBLIC SCHOOLS," the objects of the charity are sufficiently certain and definite.

COUNTIES HAVE CAPACITY TO RECEIVE BEQUEST OF LANDS IN TRUST FOR BENEFIT OF PUBLIC SCHOOLS. The law enjoins upon them the duty of maintaining and conducting a system of schools; and the purposes of the trust being thus germane to the objects of the county's existence, and relating to matters which will promote and aid and perfect those objects, there is no legal impediment to the corporation's taking the devise upon trust.

CONDITION WILL BE HELD TO BE CONDITION SUBSEQUENT if the act does not necessarily precede the vesting of the estate, but may accompany or follow it.

SUIT by the heirs of Daniel Alexander to set aside his will for reasons which will appear from the opinion. In this will, the testator, after directing that two thirds of all the real estate which he owned in the state of Texas should go to his brothers and sisters, if they should appear and claim the same within five years, provided: "One third of my land I wish to be appropriated to the use and benefit of schools, in the different counties in which my land is situated, on condition that the county commissioners of different counties in which my land is situated will pay the taxes on the land bequeathed by me for the use of schools." To this will he afterwards added a codicil, in which he provided that, "I wish the county in which I die and am buried to have and enjoy, for the benefit of public schools, two thirds of the land in the county I am buried in."

Pendleton, McIlhenny, and J. A. and R. Green, for the plaintiff in error.

Chandler and Turner, and M. D. Herring, for the defendants in error.

By Court, WHEELER, C. J. There is nothing in the objection that no motion for a new trial appears to have been filed. A jury having been waived and the case submitted to the court, a motion for a new trial was not necessary to entitle the plaintiff in error to a revision of the judgment.

The grounds of objection urged to the validity of the will which require notice are: 1. That the words of the will are not sufficient to pass the title, and that the county is not capable of taking, under the will, the title to the property devised; 2. That the purposes of the trust are too uncertain and indefinite to be capable of being carried into effect.

It is a familiar doctrine that in the construction of a will the intention of the testator is the first and great object of inquiry; and the law will not suffer the intention to be defeated merely because the testator has not clothed his ideas in technical language. Our statute, like that of New York and many of the other states, has swept away, as Chancellor Kent has expressed it (4 Kent's Com. 537), all the established rules of construction of wills in respect to the quantity of interest conveyed, by declaring that "every estate in lands which shall hereafter be granted, conveyed, or devised to one, although other words heretofore necessary at common law to transfer an estate in fee-simple be not added, shall be deemed a fee-simple, if a less estate be not limited by express words or do not appear to have been granted, conveyed, or devised by construction or operation of law:" Hart. Dig., art. 169.

It cannot be doubted that by employing the words "I wish the county in which I die and am buried to have and enjoy, for the benefit of public schools, two thirds of the land in the county I am buried in," taken in connection with the words "my land" and "the land I own," used in other parts of the will and in the context, the testator meant to devise an estate in lands; and as there are no words in the will indicative of an intention to devise a less estate, the devise must be held to pass an estate in fee, or the whole estate of the grantor: Hart. Dig., art. 168. Indeed, it is plain that a less estate could not have been intended, because the trusts with which the testator has sought to charge his lands, and the acts which, by his will, he has required to be done, could not be performed, unless an estate in fee-simple be taken by the devisee. It is a rule of construction of the common law, independently of the statute, that in every case where land is charged with a trust which cannot be performed, or where the will directs an act to be done which cannot be accomplished unless a greater estate

than one for life be taken, it becomes necessary that the devise be enlarged to a fee: 4 Kent's Com. 540; *Collier v. Walker*, 6 Co. 16; *Doe v. Woodhouse*, 4 T. R. 89. But the necessity of resorting to this rule of the common law no longer exists. It is clear that the testator intended to devise an estate in lands; and as a less estate is not limited by express words, and does not appear to have been devised by construction or operation of law, it must be deemed to be an estate in fee. Indeed, the intention of the testator, to be collected from the whole will, to devise an estate in fee-simple, is too clear for doubt or controversy.

There is as little doubt of the capacity of the county to take an estate in lands, by grant or devise. The statute declares that "each county which now exists, or which may be hereafter established in this state, shall be a body corporate and politic:" Hart. Dig., art. 206. They may sue and be sued, plead and be impleaded: Id., art. 207. They may take and hold and dispose of private property for municipal uses: Id., arts. 213 et seq.; or such uses and purposes as subserve the public good, and the exercise of the local and subordinate legislative powers, with which they may be invested by the public law of the state, or by private legislative acts: Angell & Ames on Corp. 30; 2 Kent's Com. 275, and notes. Though public corporations, they have the same capacity in this respect and to this extent as a private corporation, to take and hold property in trust.

In the great case upon the construction of Girard's will, Judge Story says: "Although it was in early times held that a corporation could not take and hold real or personal estate in trust, upon the ground that there was a defect of one of the requisites to create a good trustee, viz., the want of confidence in the person, yet that doctrine has been long since exploded as unsound and too artificial; and it is now held that where the corporation has a legal capacity to take real or personal estate, it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compelled to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable, but it will simply require a new trustee to be substituted by the proper court possessing equity jurisdiction, to enforce and perfect the objects of the trust:" *Vidal v. Girard's Ex'rs*, 2 How. 187. 188.

It is unnecessary to examine the cases cited by counsel for the appellee to show that devises or bequests to unincorporated societies for charitable uses, where the objects or beneficiaries were indefinite or uncertain; or that charities, where no trust is interposed, and no legal interest is vested, and where the charity is general and indefinite, both as to persons and objects, and too vague to be claimed by those for whom the beneficial interest was intended, cannot be upheld and enforced by a court of equity in this country, where the statute of 43 Elizabeth, called the statute of charitable uses, is not in force. It might suffice to say that the present is not such a case. But the case mainly relied on, and perhaps the best considered and most authoritative case cited by counsel, in support of the objection that the beneficiaries, or objects of the trust, in the present case are too indefinite and uncertain to enable a court of equity to uphold the devise, is the case of *Baptist Association v. Hart*, 4 Wheat. 1. But that decision would not be an authority for the doctrine contended for, as applied to the present case. That was a bequest of personal property to an unincorporated society, "The Baptist Association that, for ordinary, meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." The court held that the association, not being incorporated, could not take this trust as a society; that the individual associates could not take as trustees, they being a body vague and uncertain; and that no legal interest vested; and that legacies to charities were sustained in England under the statute of Elizabeth only.

The devise in the present case is to a corporation, capable, as we have seen, of taking the legal estate in trust; and the objects of the charity are certain and definite. The case of the *Baptist Association v. Hart*, *supra*, therefore, clearly is not a case in point. But if that were a case in point, the decision has been greatly modified, if its authority has not been entirely overthrown, by subsequent investigations and decisions; and particularly by the great case of *Vidal v. Girard's Ex'rs*, 2 How. 127, decided by the same learned court. In distinguishing this latter case from the former, Mr. Justice Story, delivering the unanimous opinion of the court, observed that in the former case "the donees were an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the

beneficiaries were also uncertain and indefinite." Both circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite; and he observes that the court came to the conclusion that at the common law, antecedent to and independent of the statute of 43 Eliz., c. 4, no donation to charity could be enforced in chancery where both of these circumstances, or rather where both of these defects, occurred. He further observes that the authorities and lights upon which the court decided were in no small degree shadowy, obscure, and flickering. The court review the additional authorities, now brought to their attention; and, observing that very strong additional light has been thrown upon the subject, conclude that these new sources of information "establish, in the most satisfactory and conclusive manner, that cases of charities, where there were trustees appointed for general and indefinite charities as well as for specific charities, were familiarly known to, and acted upon, and enforced in the court of chancery." "Whatever doubts, therefore," they say, "might properly be entertained upon the subject, when the case of the *Baptist Association v. Hart*, 4 Wheat. 1, was before this court (1819), those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."

And in the later editions of his commentaries, Judge Story, upon a review of the authorities, attains a conclusion the contrary of that expressed in his first publication, and says: "Upon the whole, it seems now to be the better opinion that the jurisdiction of the court of chancery over charities, where no trust is interposed, or where there is no person *in esse* capable of taking, or where the charity is of an indefinite nature, is to be referred to the general jurisdiction of that court, anterior to the statute of Elizabeth: " 2 Story's Eq. Jur., sec. 1162.

Chancellor Kent, in a learned note to his Commentaries, where he examines this subject, quotes the observation of Chancellor Walworth, "that the decision in the case of the *Baptist Association v. Hart*, 4 Wheat. 1, is generally admitted to be wrong;" and after reviewing the authorities, says: "The fact, I think, may be considered indisputable that chancery uses are lawful uses by the common law, and that the statute of Elizabeth was only an ancillary remedy, now supplied by chancery, as the rightful original tribunal for such trusts:" 2 Kent's Com., 8th ed., 288, note. Similar opinions appear to have been held in Massachusetts, New York: *McCartee v. Orphans' Asy-*

lum Society, 9 Cow. 437 [18 Am. Dec. 516]; *Van Duzer v. Van Duzer*, 6 Paige, 367 [31 Am. Dec. 257]; Pennsylvania: *Witman v. Lex*, 17 Serg. & R. 88 [17 Am. Dec. 644]; Kentucky: *Moore v. Moore*, 4 Dana, 357; Tennessee: *Dickson v. Montgomery*, 1 Swan, 348; Mississippi: *Wade v. American Colonization Society*, 7 Smed. & M. 663 [45 Am. Dec. 324]; and in many if not most of the other states; and see cases cited in notes to 1 Jarman on Wills, Perkins's ed., 194; American notes to 2 Roper on Legacies, 1115; 4 Kent's Com., 8th ed., 508, and notes; 2 Story's Eq. Jur., sec. 32.

But it is unnecessary, in the present case, to decide whether equity will enforce a donation to charitable uses, where the donees are uncertain, or where the beneficiaries and objects of the trust are uncertain and indefinite. There is no such uncertainty in the present case. We have seen that the trustee is capable of taking and holding the estate in trust. The purposes of the trust are definite and certain. And if those purposes are germane to the objects of the incorporation; if they relate to matters which will promote and aid and perfect those objects—there can be no legal impediment to the corporation taking the devise upon trust: *Vidal v. Girard's Ex'rs*, 2 How. 189; and see the case of *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99. That such are the purposes of the trust is sufficiently apparent by reference to the subjects confided by law to the management and local government of the counties, and particularly the laws which enjoin upon them the duty of executing the identical trusts which this devise was intended to aid in advancing and perfecting.

By the constitution of the state, the legislature is required "to make suitable provision for the support and maintenance of public schools;" to "establish free schools throughout the state," and "furnish means for their support by taxation on property;" "to set apart not less than one tenth of the revenue of the state, derivable from taxation, as a perpetual fund, which fund shall be appropriated to the support of free public schools:" Const., art. 10, secs. 1, 2. The establishment of public schools throughout the state is thus provided for and enjoined by the paramount law. And the grants of public land, heretofore made for public schools, are recognized and confirmed to the counties: Id., secs. 3, 4; Acts of Jan. 26, 1839, and Feb. 5, 1840; Hart. Dig., pp. 290, 292. And by act of the sixteenth of January, 1850, it is provided that every county which has been or may hereafter be established shall have surveyed and set apart four leagues of land for the pur-

poses of education, in conformity to the act of the twenty-sixth of January, 1839: Hart. Dig., art. 896. The act of the twenty-first of January, 1854, "to establish a system of schools" (Laws 5th Leg., c. 18), sets apart two millions of dollars, in the treasury of the state, "as a school fund for the support and maintenance of public schools;" and constitutes the chief justices and county commissioners of the several counties a board of school commissioners for their respective counties, to form their respective counties into school districts, and order an election of trustees for each district: Const., sec. 2. The trustees so elected are constituted a body corporate and politic, with the capacity to sue and be sued, to hold and dispose of property, and "do such acts and things as are incidental and necessary to the performance of their duties," as prescribed by the law: Const., sec. 15. This and the subsequent acts of the twenty-ninth of August, 1856, and the fifth of February, 1858 (Laws 6th Leg. 107; Laws 7th Leg. 124), contain further provisions for the establishment and support of public schools, which it is not necessary, to our present purpose, to notice.

It is thus seen that the counties are empowered by law to take and hold land in trust for the uses and purposes of the donation here in question; and that they are provided by law with the requisite machinery and means, and intrusted with the duty of executing the trust, in the manner and for the identical objects and purposes contemplated by the donor. There is, therefore, no foundation for the objection that the county is incompetent to take as trustee; or that the objects of the trust are indefinite; or that the county is incompetent to take and administer the trust. It is true, the individual beneficiaries who shall be recipients of the donor's bounty are not known: if they were, it would not be a charity. The counties are intrusted with the duty to provide for the support of indigent persons resident in the county: Hart. Dig., art. 809; and it cannot be doubted they are competent to take and administer a charitable bequest for that purpose.

There is nothing in the objection that the county had not paid the taxes upon the land. If the true construction of the whole will and codicil be, that the payment of taxes by the county commissioners was a condition annexed to the devise, it cannot be supposed that the payment was intended to precede the vesting of the estate; it must have been intended to follow it. And it is well settled that if the act does not necessarily pre-

cede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent: *Finlay v. King*, 3 Pet. 346. The will and codicil contain a general devise, in words importing a present interest, and the effect manifestly was to vest the estate in the trustee, upon the death of the deviser.

Our opinion therefore is, that the will contains a legal and valid devise of the property in question to the county in trust for the uses and purposes therein expressed. To hold otherwise would be to deny to the courts of this state the power to uphold or enforce a charitable bequest in any case. Such a determination, it is believed, would not find countenance in any well-considered decision.

We are of opinion, therefore, that the judgment be reversed, and such judgment be here rendered as the court below ought to have rendered.

Reversed and reformed.

INTENTION OF TESTATOR MUST ALWAYS GOVERN in the construction of his will, unless such intention is contrary to law: *Montgomery v. Millikin*, 43 Am. Dec. 507; *Stoner's Appeal*, 45 Id. 608; *Baskin's Appeal*, Id. 641; *Wright v. Hicks*, 56 Id. 451; *Wynne v. Wynne*, 57 Id. 139; *Armorer v. Case*, 61 Id. 209; *Battle Square Church v. Grant*, 63 Id. 725; *German v. German*, 67 Id. 451, and notes.

WORDS IN WILL TO PASS TITLE TO REALTY.—A will of "all I possess, indoors and outdoors," is sufficient to pass real estate: *Tolar v. Tolar*, 14 Am. Dec. 575. Devise of "all my landed estate," followed by a description of several tracts of land, will not pass a lot not described: *Myers v. Myers*, 16 Id. 648.

WORDS IN WILL TO PASS FEE: See *Smith v. Starr*, 31 Am. Dec. 498; *Zimmerman v. Anders*, 40 Id. 552; *Bell v. Scammon*, 41 Id. 706; *Heard v. Her-ton*, 43 Id. 659; *Garland v. Watt*, 42 Id. 120; *Rubey v. Barnett*, 49 Id. 112; *Maeck v. Nason*, 52 Id. 41; *Schriever v. Meyer*, 57 Id. 634, and notes.

TRUSTEES TAKE EXACTLY THAT QUANTITY OF INTEREST IN ESTATE WHICH PURPOSES OF TRUST REQUIRE, and in the absence of any express limitation sufficient to carry the legal inheritance, the estate of the trustees may be enlarged and extended into such an estate as the nature of the trust may require; the construction in this respect to be governed mainly by the intention of the testator, as gathered from the general scope of the will: *Ellis v. Flater*, 65 Am. Dec. 52, and note.

CORPORATIONS MAY NOW TAKE AS TRUSTEES: *Commissioners v. Walker*, 38 Am. Dec. 433. But see *Greene v. Dennis*, 16 Id. 58.

COUNTIES ARE POLITICAL AGGREGATE CORPORATIONS capable of exercising such powers as they may be vested with by the legislature, and are sometimes called quasi corporations. They are clothed with powers and attributes of corporations to a sufficient extent to be able to act and contract, and to become debtor and creditor: *Louisville etc. R. R. Co. v. County Court*, 62 Am. Dec. 424.

THE PRINCIPAL CASE IS CITED in *Battle v. Mack*, 33 Tex. 798, to the point that where a jury has been waived in the district court and the case tried by the court, on appeal to the supreme court they are left to enter such decree as they think the district court should have rendered; in *Milam County v. Bateman*, 54 Id. 163, to the point that under the Texas law counties are bodies corporate and politic, and have capacity to take and hold title in fee to real and personal property; and in *Dikes v. Miller*, 25 Id. 290, to the point that the state undoubtedly has power to take by deed or devise. It is cited in *Paschal v. Acklin*, 27 Id. 196, to the point that a bequest for charitable uses does not come within the constitutional inhibition of perpetuities and entailments, and in the same case, at page 200, to the point that a bequest to the poor of Sumner county is not too vague and uncertain to be enforced as a charity.

CASTRO v. ILLIES. CAUSIOI v. ILLIES.

[22 TEXAS, 479.]

EXECUTION MAY ISSUE UPON JUDGMENT OF DISTRICT COURT, from which a writ of error has been prosecuted without a *superedeas*.

WHERE CERTAIN PROPERTY OF MORTGAGOR IS ERRONEOUSLY SUBSTITUTED IN FORECLOSURE DECREE against him, in lieu of a part of the property described in his mortgage, to which his title had failed, under an execution issued on this decree, a sale of the property described in the mortgage alone is proper. Consequently, where the sum realized from this sale is insufficient to satisfy the decree, and execution is issued and levied upon other property of the mortgagor, it cannot be objected to the title of the purchaser thereunder that the property described in the decree had not been exhausted and found insufficient.

PROPERTY RIGHTS OF PERSONS MARRIED IN OTHER COUNTRIES, WHO HAVE REMOVED AND BECOME DOMICILED HERE, in the absence of an express contract, are to be governed, as to all after acquisitions of property here, by the laws of this state.

WHERE THERE IS EXPRESS NUPTIAL CONTRACT, if it speaks fully to the very point, it will generally be admitted to govern all the property of the parties, not only in the matrimonial domicile, but in every other place under the limitations and restrictions which apply to other cases of contracts, that they are not in contravention of the laws or policy of the country where they are sought to be enforced, or with the rights of its own citizens who contract with such parties, with regard to notice of their marriage contract.

EXPRESS NUPTIAL CONTRACT GOVERNS PROPERTY RIGHTS OF MARRIED PERSONS, in movable property everywhere, but as to immovable property in a foreign territory it will at most confer only a right of action, to be enforced according to the jurisprudence *rei sitæ*. But where there is a change of domicile, the law of the actual domicile will govern as to all future acquisitions of movable property, and as to all immovable property the law *rei sitæ*.

MARRIAGE CONTRACT—CHANGE OF DOMICILE.—Where there is an express nuptial contract, that governs as to all acquisitions and gains of property made by the parties where they were married and continue to reside.

Where there is no such contract, the customary law of the matrimonial domicile governs in like manner. But in both cases all acquisitions and gains made after a change of domicile are governed by the law of the actual domicile.

WHERE THERE HAS BEEN CHANGE OF DOMICILE AFTER MAKING OF EXPRESS NUPTIAL CONTRACT, the law of the after-acquired domicile will govern as to all after-acquired property; unless where the contract was made with reference to that law, or in view of a change of domicile, and it was the intention of the parties that the contract should govern wherever they should reside.

MARRIAGE CONTRACT AFFECTING AFTER-ACQUIRED PROPERTY, IN CASE OF CHANGE OF DOMICILE.—A marriage contract referred to the laws of the country where the parties were married, and declared that the property rights of the parties should be governed by such laws. It made no provision with regard to after-acquired property, nor did it refer to a change of residence. *Held*, that the inference would be that the parties did not contemplate a change of domicile, nor contract with reference thereto, and that while the contract would govern their after-acquired property in the country where they were married, it would have no influence beyond the jurisdictional limits of the laws of that country.

NOTICE OF MARRIAGE CONTRACT CHANGING PROPERTY RIGHTS OF PARTIES THERETO.—Whatever may be the property rights of parties to a nuptial contract entered into in a foreign country, as between themselves their contract cannot have the effect to govern their rights in their real property, acquired and situated in Texas, to the prejudice of the rights of her citizens who have contracted on the faith of the property, and without notice of a contract giving it a different *status* from that of other parties, or establishing a rule for its government variant from the law of the land.

PROPERTY CONVEYED TO MARRIED WOMAN IS PRESUMED TO BE COMMUNITY PROPERTY, and it devolves upon her to show by clear and satisfactory proof that it was purchased with her own individual means.

CONVEYANCE, TO BE VALID AS TO THIRD PARTIES, MUST NOT ONLY BE UPON GOOD CONSIDERATION, but must be *bona fide* also, and not made to hinder, delay, or defraud creditors.

INTENTION OF HUSBAND IN CONVEYING PROPERTY TO HIS WIFE IS PRESUMED TO BE KNOWN TO HER. From the relations of the parties, it is scarcely to be supposed that this is not so.

COURT MAY PROPERLY DECLINE TO CALL ESPECIAL ATTENTION OF JURY TO PARTICULAR PART OF EVIDENCE, by instructions as to the weight to which it is entitled, or the purposes for which it may be considered by them.

THESE were two suits brought by Illies against Henry Castro and his wife, Amalie Mathias Castro, and one Causici, to recover a number of pieces of land which plaintiffs claimed as purchasers at sales had under executions issued upon a judgment of the district court, rendered June 25, 1852, in plaintiffs' favor, and against Castro. Plaintiffs averred that defendants Causici and Mrs. Castro claimed title to certain of the lands under two trust deeds, which they alleged to be fraudulent and void; also that Mrs. Castro claimed title to another of the

pieces as her separate property, under a deed from one Lacoste, but which they alleged to be community property. Defendants' answer denied all of plaintiffs' averments; alleged that their pretended title was void, as the judgments upon which their executions had issued was reversed by the supreme court; and set up a marriage contract entered into between Castro and his wife in Paris, France, in 1813, which they claimed controlled the disposition of their property. Both cases were submitted to the jury together. At the trial, it appeared that Illies had recovered a judgment against Castro in the district court, June 25, 1852, foreclosing a mortgage made by Castro to Illies. At the time of entering up this foreclosure decree, it appearing that the title of Castro to part of the land described in the mortgage had failed, and that he had acquired by certain legislation other lands in lieu thereof, the court embraced these latter lands in the foreclosure decree, and ordered the whole to be sold in satisfaction of the judgment, execution to issue for any balance that might remain unpaid. In August, 1853, Castro prosecuted a writ of error from this judgment to the supreme court without superseding the judgment. The supreme court reversed so much of this decree as ordered the sale of other lands than those described in the mortgage, and affirmed it in every other particular: See 13 Tex. 229. At various dates in June, July, and November, 1853, Illies procured executions to issue upon the judgment of the district court, and at sales thereunder Illies purchased the various tracts herein sought to be recovered. The antenuptial contract set up by defendant was executed by himself and wife in Paris, France, in 1813, and provided that there should be no community of property between the husband and wife, that they should hold their property separate, and with certain modifications they intended to submit to the provisions of the Code Napoleon relating to marriage contracts, also that the wife should have the administration of her real and personal property, and the free enjoyment of her income. The remainder of the case appears from the opinion.

Wall and Upson, for the appellants.

I. A. and G. W. Paschal, for the appellee.

By Court, WHEELER, C. J. The objection to the plaintiffs' evidence of title, that the mortgaged lands included in the decree of foreclosure of the twenty-fifth of June, 1852, were not

exhausted by the order of sale issued thereon, and found insufficient to satisfy the judgment before execution was issued and levied on other lands, is not supported by the record. On the contrary, it appears that all the mortgaged lands included in the decree, and all which by the judgment of this court were subject to seizure and sale under the decree, were first sold. The judgment was not superseded upon prosecuting the writ of error. It was therefore an authority for the issuance of execution; and it cannot affect the title of the purchaser at the sale, that property was not sold under the decree, to which the defendant in execution had no title, and upon which the decree could not legally operate, or which was not legally subject to seizure and sale on execution under the decree. It cannot be questioned that the judgment was an authority for the issuance of execution, or that it conferred on the officer competent authority and power to sell; and neither in the issuance of the executions, nor in the manner of executing the power conferred by them, is it perceived that there was any illegality or error affecting the title of the purchaser, or which can be ground of objection or complaint by the appellants: *Martin v. Rice*, 16 Tex. 157; *Kendrick v. Rice*, Id. 254; *Hancock v. Metz*, 15 Id. 205; *Mosely v. Gainer*, 10 Id. 393.

The ground mainly relied on for a reversal of the judgment relates to the charge of the court, and the refusal of instructions concerning the effect of the marriage contract of the third of November, 1813.

It may be conceded for the purposes of this case (and the examination of the question is therefore unnecessary) that the interpretation of the contract claimed for the appellants is correct, according to the law of the place where the contract was consummated; that is, that by the celebration of the marriage under the contract, there was a separation of property of the spouses, and that Mr. Castro became indebted to his wife in the estimated value of her property; and it may be further conceded that the contract furnished the rule of property, personal and real, as to all after acquisitions in the country of their matrimonial domicile; and as to movable property elsewhere, if such be deemed to have been the intention of the contracting parties. But does it govern the acquisition of real property in this state after, by their removal here, the parties have subjected themselves and their rights of property acquired here to the laws of this state? Does it take such property out of the operation of the law of community of this state? Is it

to be held and considered as affecting the rights of our citizens contracting with them in reference to their property acquired or to be acquired in this state, and without any record or other notice of their marriage contract?

In the absence of an express contract, it is not questioned that the marital rights of persons married in other countries, who have removed and become domiciled here, are to be governed, as to all after acquisitions of property here, by the law of this state. Such is the law, by positive enactment: Hart. Dig., art. 2419. But it is insisted that the contract in question, from its date, became the law, and furnished the rule of property of the parties to it; adhering to and following them into any country to which they might remove; that it accompanied them in their removal to this state, and here negatives and displaces the law of the state contravening its provisions. Is it correct to suppose that this contract has possessed the invincible force and legal ubiquity which is ascribed to it, while the evidence of it has remained in the original archive in Paris, until it became necessary to invoke its presence here for the purposes of this controversy?

The general rule, irrespective of the question of the effect of a change of domicile, is undoubted, that where there is an express nuptial contract, "if it speaks fully to the very point," it will generally be admitted to govern all the property of the parties, not only in the matrimonial domicile, but in every other place, under the limitations and restrictions which apply to other cases of contracts, that they are not in contravention of the laws or policy of the country where they are sought to be enforced, or with the rights of its own citizens. "It will act directly on movable property everywhere; but as to immovable property in a foreign territory, it will, at most, confer only a right of action to be enforced according to the jurisprudence *rei sitæ*:" Story's Conf. L., secs. 143, 184; *Le Breton v. Miles*, 8 Paige, 261. But "where there is a change of domicile, the law of the actual domicile will govern as to all future acquisitions of movable property; and as to all immovable property, the law *rei sitæ*:" Story's Conf. L., sec. 187. "Where there is an express contract, that governs as to all acquisitions and gains before removal. Where there is no express contract, the customary law of the matrimonial domicile governs in like manner. But in both cases all acquisitions and gains made after the removal are governed by the law of the actual domicile:" *Id.*, sec. 177; *Saul v. His Creditors*, 5 Mart., N. S., 569

[16 Am. Dec. 212]. Such are the doctrines maintained by the supreme court of Louisiana, where questions of this nature, according to Judge Story, have arisen and been discussed more frequently and learnedly than in any common-law country.

The learned commentator upon the conflict of laws, after reviewing the writings and opinions of foreign jurists upon the subject, commends the doctrines maintained by the court in Louisiana as those which will most probably form the basis of American jurisprudence upon this subject. "They have," he adds, "much to commend them in their intrinsic convenience and equity; and they seem best to harmonize with the known principles of the common law in other cases:" Story's Confl. L., sec. 183. The decisions of that learned court upon this subject are especially entitled to weight with us, for the further reason that their former law and their legislation upon this subject have been the same as our own: Hart. Dig., art. 2419; Civil Code Revised, 2370; *Saul v. His Creditors*, *supra*.

The principles we have extracted from the text of Judge Story, and the cases from which he has deduced them, are decisive of the question we are considering, adversely to the doctrine contended for on behalf of the appellants, at least as to the real property here in question. The reasoning of the court in the case of *Saul v. His Creditors*, *supra*, would go far to maintain that where there has been a change of domicile after the making of an express nuptial contract the law of the after-acquired domicile will govern as to all after-acquired property, unless where the contract was made with reference to that law or in view of a change of domicile, or such an event was in the contemplation of the parties, or the intention was in some way manifest, that the contract should govern as to the rights of property of the parties, wherever they might reside.

The court adopt the generally received opinion among jurists that the law of the matrimonial domicile governs the rights of married persons where there is no express nuptial contract, because they are presumed to have had in view and to have contracted marriage with reference to that law. But they do not consider this tacit contract a satisfactory ground for holding, with some foreign jurists, that it follows them wherever they go, especially where it is applied to property acquired after a change of domicile of the parties. The presumption as to their agreement cannot be extended so as to give a greater effect to those laws than they really had. The extent of the

tacit agreement depends on the extent of the law, and as that was limited by the jurisdiction of the power by which it was enacted, the tacit agreement of the parties must have a like limitation. "In a word, the parties are presumed to have agreed that the law should bind them as far as that law extended, but no further." The tacit contract is to be construed precisely as if the laws of the place were inserted in it. If the law of community existed in the state where the marriage took place, this law regulates the property which the parties acquire in that state, but does not regulate that which they acquire in another country to which they remove. The insertion of this law in a nuptial contract would be nothing more than a declaration that, while residing within that state, there should be a community of acquets and gains. Such an agreement could not have the same force as one which expressly declared there should be a community of acquets and gains between the parties wherever they went: *Saul v. His Creditors*, 5 Mart., N. S., 603-605 [16 Am. Dec. 212]. Such is the course of reasoning by which the court arrive at the conclusion that the law of the matrimonial domicile does not follow the parties and regulate their rights of property acquired after a change of domicile.

This was not the case of an express contract. But the reasoning would seem to lead to the conclusion that where there is one, and it does not expressly provide, or the intention be not manifest, that it is to apply to and govern all after-acquired property, wherever the parties may reside, it will not be admitted to have that effect upon such property as they acquire in the country to which they subsequently remove. However that might be as to after-acquired personal property, there can be, it would seem, no doubt that such is the rule as to real property situated in the country to which the removal takes place. The cases in Louisiana in which this subject has been discussed arose and were determined upon a full examination of the whole doctrine, upon principle and authority, upon the law as it stood before the adoption of the revised code, which contains substantially the same provision as our statute of the twentieth of January, 1840: Hart. Dig., art. 2419; *Saul v. His Creditors*, 5 Mart., N. S., 573, 574 [16 Am. Dec. 212]. The code is deemed indisputably to furnish the rule for all future cases in that state: *Id.* Hence, if the present case were before that learned court, it would doubtless be held that the law of community existed between the parties to this contract in respect to the property here in question.

It is to be observed that in this contract there is no stipulation that its provisions shall govern as to property thereafter acquired, in whatever country the parties may reside. There is no reference to property to be acquired in any other country, nor to the laws of any other country than that in which the marriage was contracted. But there is an express reference to the law of that country, and a declaration of intention to be governed by its provisions, with certain modifications therein expressed. The inference would seem to be that the parties did not contemplate a change of domicile, and did not contract with reference to their after acquisitions in case of removal to another country. They, it would seem, did not intend to provide a rule of property for their government after such removal. They do not appear to have had in contemplation that state of the case, or to have intended to provide for it. Their contract does not speak to that point; but it does expressly adopt, with certain modifications, the law of the country of their residence; and the case does not seem materially to differ from the case supposed, of an incorporation into a nuptial contract of the law of the place where it was made. So considered, it would govern their after-acquired property there, but would have no influence, it is supposed, beyond the jurisdictional limits of the laws of that country.

The case of *Le Breton v. Miles*, 8 Paige, 261, cited by counsel for the appellants, is not opposed to this view of the law. There, the contract was made between natives of France, residing at the time in New York, but with express reference to the law of France, and to an intended residence there. The laws of France in force at the time of the consummation of the marriage, therefore, very properly applied to and governed their rights of property under the contract.

The case of *Decouche v. Savetier*, 3 Johns. Ch. 190 [8 Am. Dec. 478], also cited by counsel for the appellants, does not in the least militate against the view taken by the court in Louisiana. That was upon an express nuptial contract, which contained the following provision: "That there shall be a community of property between them [the parties to the contract], according to the custom of Paris, which is to govern the disposition of the property, though the parties should hereafter settle in countries where the laws and usages are different or contrary." And the wife, in that case, did not accompany her husband, who abandoned her and came to reside in New York, where he acquired a personal estate, which was disposed of by

the court according to the law and express terms of the contract. Here, as we have seen, the contract contains no similar stipulation or provision, and the property in question is not personalty, but realty, in respect to which the law *rei sitæ* is held to govern.

It would be extremely difficult, we apprehend, upon the ground of this contract, to deny to Mrs. Castro her community rights and interest in the property acquired by her husband since their removal to this state. Her claims, it is believed, could not be successfully resisted upon any recognized principle in the law of this country, which may be invoked to determine the marital rights of persons who have subjected themselves and their rights in the acquisition of property to the influence of our laws. But whatever may be the rights of the parties to the contract, as between themselves and their representatives in the succession to their property, we think it clear that the contract in question cannot have the effect to govern their rights in their real property, acquired and situate here, to the prejudice of the rights of other citizens who have contracted on the faith of the property, and without notice of a contract giving it a different *status* from that of other parties, or establishing a rule for its government variant from the law of the land. If the contract be the law for the parties to it in this state, it is not the law for other citizens of the state; and until notice, cannot be invoked to the prejudice of their rights: Hart. Dig., art. 2414; *Hall v. Harris*, 11 Tex. 300; *Young v. Templeton*, 4 La. Ann. 254 [50 Am. Dec. 568]. We conclude, therefore, that the legal presumption applies with its full force, that the property was community property acquired with the funds of the community; and that the conveyance to Mrs. Castro, or to her use, carried with it this legal presumption, which it devolved on her to repel by clear and satisfactory proof, that it was purchased with her own individual money or means.

But it is not perceived that the case would be materially different, whether the law of the state or the contract be deemed to govern the rights of property of the parties. If the latter, it is conceded that the doctrine of tacit mortgage cannot be invoked to aid the claims of the appellants: *Hall v. Harris*, 11 Tex. 300. And if the parties are to be deemed to be separate in their property, "as if they were simply two friends inhabiting the same house," still the conveyance by one to the other would be liable to be impeached for fraud. And if the contract *per se* afforded evidence of a valuable consideration passing from Mrs. Castro for the conveyance of the property, as the

court instructed the jury that it would, and the conveyances were binding as between the parties to them, still, if made in fraud of the rights of creditors of the party making them, they might be avoided as to them. It is not enough that a conveyance be upon good consideration; it must be *bona fide* also, and not made to hinder, delay, or defraud creditors. Whether the conveyances were so made and intended was the material issue submitted for the decision of the jury. It was fairly left to their decision by the charge of the court. And in view of all the circumstances surrounding the transactions, the embarrassed circumstances of Mr. Castro, commencing, it seems, as early as 1847; his heavy indebtedness to the appellee; his property consisting principally in lands, which, from the evidence, it would be reasonable to conclude, were not easily available to pay a debt of twenty thousand dollars, which, it seems, the appellee was seeking to enforce or secure before the date of the first conveyance, and about which litigation had already commenced—in view of all the facts disclosed by the evidence, and the nature and surrounding circumstances of the transactions, we cannot say the evidence was not sufficient to warrant the verdict.

In reference to the objection that there is no evidence of a knowledge of the imputed intent, on the part of the beneficiaries, it will suffice to say that, from the relations of the parties, it is scarcely to be supposed that the circumstances and intentions of the grantor were not known to the beneficiary. The court did not err in refusing to give the instructions asked, respecting the consideration of the conveyances, in the terms in which they were propounded. The instruction given was sufficient upon that subject. Nor was there error in refusing the eighth and final instruction asked. The contract had been admitted in evidence, and was before the jury for their consideration; and the court might very properly decline to call their especial attention to a particular part of the evidence, by instructions as to the weight to which it was entitled, or the purposes for which it might be considered by them. It was in evidence before them for their consideration, in connection with the other evidence in the case, and that was sufficient.

We are of opinion that there is no error in the judgment, and it is affirmed.

Judgment affirmed.

RIGHTS OF HUSBAND AND WIFE TO MOVABLE PROPERTY ARE GOVERNED BY LAW OF MATRIMONIAL DOMICILE, no matter where such property happens to be, or how or where it is acquired: *McLean v. Hardin*, 69 Am. Dec.

740. Where there has been a change of domicile, law of actual and not matrimonial domicile will govern as to all future acquisitions of movable property: *State v. Barrow*, 65 Id. 109; *Hairston v. Hairston*, 61 Id. 530, and notes to these cases.

RIGHTS OF HUSBAND AND WIFE IN IMMOVABLE PROPERTY belonging to either are governed by the law of the place where it is situated: *Newcomer v. Orem*, 56 Am. Dec. 717; *Kneeland v. Ensley*, 33 Id. 168, and notes.

GENERALLY, WHAT LAW GOVERNS PROPERTY RIGHTS OF MARRIED PERSONS: *Doss v. Campbell*, 54 Am. Dec. 196; *Allen v. Allen*, 39 Id. 553; *Packwood's Succession*, 43 Id. 230; *Routh v. Routh*, 41 Id. 326; *Depas v. Mayo*, 49 Id. 88; *Youse v. Norcoms*, 51 Id. 175, and notes.

PRESUMPTION THAT PROPERTY PURCHASED DURING MARRIAGE IS COMMUNITY PROPERTY is very cogent, and can only be repelled by clear and conclusive proof: *Love v. Robertson*, 56 Am. Dec. 41; *Huston v. Curd*, 58 Id. 110, and notes.

TRANSFER IS FRAUDULENT AGAINST CREDITORS, THOUGH MADE FOR VALUABLE CONSIDERATION, if not made in good faith, but with the intent to hinder, delay, and defraud creditors: *Mills v. Howeth*, 70 Am. Dec. 331, and note; *Wood v. Chambers*, Id. 382.

CALLING MINDS OF JURY TO PARTICULAR PARTS OF EVIDENCE is objectionable, as giving such parts undue prominence: *Wood v. Chambers*, 70 Am. Dec. 382, and note.

THE PRINCIPAL CASE IS OFFED to the point that where a deed is made without consideration, and with intent to defraud creditors, the land attempted to be conveyed remains subject to the grantor's antecedent debts, in *Tuttle v. Turner*, 28 Tex. 759-772; *Weisiger v. Chisholm*, Id. 780-790; *Cox v. Miller*, 54 Id. 28. The principal case is cited in *Lynn v. Le Gierse*, 48 Id. 138, where it was held that a judgment creditor may either institute suit to have a conveyance of land by the debtor declared fraudulent, and the land subjected to his execution, or he may cause an execution to be levied on the land fraudulently conveyed by the debtor, and after purchasing at execution sale, he may then bring his suit to have the fraudulent conveyance set aside, and recover the land.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

CARPENTER v. PIER.

[80 VERMONT, 81.]

CONCLUSIVE EFFECT OF JUDGMENT AS EVIDENCE rests upon the authority of the court; upon its acting within its jurisdiction; upon its preserving its decisions in proper records; and upon the policy and necessity of determining by law the end of controversy.

JUDGMENT OF JUSTICE OF PEACE IS JUDICIAL PROCEEDING, within section 1 of article 4 of the United States constitution; and being made in one state, is as conclusive between parties and privies thereto, though living in another state, as a judgment of the highest court of record.

FACTS WHICH ESTABLISH PRIVACY.—Where one transfers a note to another, warranting it to be valid, and upon suit by the assignee against the maker attends the trial, secures a continuance to bring witnesses to sustain the suit, his relation to the subject-matter of the suit, and his conduct, so make him a privy to the suit as to be concluded by the judgment.

SUIT BEGUN BY PARTIES VOLUNTARILY APPEARING AND JOINING ISSUE IS VALID in New York, and a judgment rendered in a suit so begun is as binding as if commenced in the ordinary way.

PARTY MAY WAIVE EXCESS OF CLAIM OVER ONE HUNDRED DOLLARS, and bring suit in justice's court, and such waiver will not affect the conclusiveness of the judgment upon parties and privies.

OMISSION TO INSIST ON CONCLUSIVENESS OF JUDGMENT AS EVIDENCE until near the close of the trial, and the introduction of other evidence, besides the judgment, to the same point, does not preclude the right to an instruction to the jury that the judgment is conclusive.

ASSUMPSIT. Orris Pier resided in Connecticut, and sold to L. M. Carpenter the note of John Mace, with warranty. Both Mace and Carpenter lived in New York. The note was not paid, and Carpenter brought suit before a justice of the peace

in New York. Mace set up the invalidity of the note, alleging want of consideration. Carpenter and Mace joined issue on the note. Carpenter then notified Pier to attend and sustain the proceedings on the note if he could. Pier attended on the day set for the trial, and procured a continuance to enable him to secure witnesses. He afterwards refused to have anything to do with the suit. Judgment was given on the merits against Carpenter, who then brought suit against Pier on his warranty. The other facts necessary to an understanding of the case are found in the opinion.

A. Peck and J. Maeck, for the plaintiff.

Charles Russell, for the defendant.

By Court, ALDIS, J. 1. The first question in this case is, whether the judgment of a justice of the peace in the state of New York, acting within his jurisdiction, is to be received in this state as conclusive upon parties and privies thereto, as to all the facts adjudicated. The judgment was duly authenticated according to the act of congress. The evidence in the county court showed that the judgment in New York would be conclusive.

The fourth article, section 1, of the United States constitution, provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Is a justice's judgment a judicial proceeding within the meaning of the article?

It was held in Massachusetts, in *Warren v. Flagg*, 2 Pick. 448, that the term "judicial proceedings" was intended to apply only to the proceedings of courts of general jurisdiction, and not to those of magistrates, or of other courts of inferior and limited jurisdiction.

It was so held in New Hampshire, in *Robinson v. Prescott*, 4 N. H. 450; and *Mahurin v. Bickford*, 6 Id. 567.

In Connecticut, *Bissell v. Edwards*, 5 Day, 363 [5 Am. Dec. 166], the judgment of a justice, rendered in states where justices hold courts of record, was held to be within the constitution, and the act of congress, passed in 1790, prescribing the mode in which such records should be authenticated.

In some of the other states—New York, *Thomas v. Robinson*, 3 Wend. 267, *Sheldon v. Hopkins*, 7 Id. 435; Ohio, *Silver Lake Bank v. Harding*, 5 Ohio, 545—it has been held that the act of congress prescribing the mode of authenticating judicial proceedings does not apply to justices' judgments; but that when

proved in the common-law mode, they are entitled to "full faith and credit."

In this state, the early decision of the supreme court in *Ingersoll v. Van Gilder*, 1 D. Chip. 59, adopted the doctrine that such judgments were only "*prima facie* evidence of a debt." That decision was made in January, 1797. In 1830, in *Starkweather v. Loomis*, 2 Vt. 573, the decision in Chipman's reports was directly overruled. The court say: "That decision was made before the subject had undergone so much investigation in the several states as has occurred since that time. But when the subject came to be examined upon principle, and in connection with the statutes that give large jurisdiction to justices, this court felt constrained to decide that though a justice has no clerk, yet where the law requires him to keep records, he must be considered as his own clerk; and if he has no seal, he may use a common seal, or may certify that he has no seal of office as an excuse for omitting to attach one to his copies of record." This decision was referred to and confirmed in *Blodget v. Jordan*, 6 Vt. 580, and may be regarded as the settled law of this state.

The conclusive effect of a judgment as evidence rests upon the authority of the court, upon its acting within its jurisdiction, upon its preserving its decisions in proper records, and upon the policy and necessity of determining by law the end of controversy. These reasons apply to the judgments of justices of the peace as well as to any others. The argument that as justices have no clerks nor seals, and cannot authenticate records in the mode prescribed by the act of congress, therefore their judgments are not entitled to full faith and credit, seems to rest upon the manner in which the court was organized, and its inability to comply with a particular form of authenticating its records, rather than upon the broader and more solid ground of the authority and jurisdiction of the court, and the interest of the community that there should be an end to litigation.

The decision in 2 Vermont does not extend beyond the judgments of justices, "where the law requires them to keep records." In New York the justices are required by law to keep records. In *Hard v. Shipman*, 6 Barb. 621, Paige, J., says the judgment of a justice of the peace is as conclusive between the parties as the judgment of the highest court of record, and it is entitled to take its rank as a record.

The record of the justice was proved in the court below, and

is referred to as a part of the case. It is ample to show the questions that were litigated and the decision of the court.

2. But this defendant, Pier, is not a party to the record, and if bound by it, it must be because he was privy to the proceedings. This leads us to inquire whether Pier stood in such a relation to the suit tried by the justice as to be bound by the judgment.

It must be assumed for the purposes of this hearing, that Pier warranted that the note was valid and given upon good consideration; that Carpenter and Mace went before the justice by agreement and without antecedent process (as by the code of procedure in New York they had a right to do), and joined issue upon the note, Mace defending upon the ground that the note was without consideration and void; that Carpenter immediately notified Pier of the suit and the defense by Mace, and called upon him to sustain the suit; that Pier was present at the time and place set for trial, and at his request Carpenter procured a continuance to enable him to bring witnesses from Vermont to sustain the validity of the note; that he afterwards refused to have anything to do with the suit; and that upon a trial on the merits Mace obtained a judgment of nonsuit against Carpenter.

If a person sell real or personal property with a warranty of title, and the purchaser finds upon suit brought that the validity of the title is denied, he may notify his warrantor to maintain the title in the suit so brought; and if the warrantor, upon reasonable notice, and with a fair opportunity to maintain his rights in the suit, neglects or refuses to do so, and a recovery is had against the title so warranted, such judgment, if obtained without fraud or collusion, will be conclusive evidence against the warrantor upon every fact established by it. This principle is of familiar application in warranties of real estate: *Brown v. Taylor*, 13 Vt. 631 [37 Am. Dec. 618]. It is claimed to extend to all cases where a party has, by express agreement or by operation of law, a right of recovery over against another, and notifies such other to appear and defend the suit: *Kip v. Brigham*, 6 Johns. 158; *Waldo v. Long*, 7 Id. 173; *Leather v. Poultney*, 4 Binn. 352; *Hamilton v. Cutts*, 4 Mass. 349 [3 Am. Dec. 222]; *Bender v. Fromberger*, 4 Dall. 436; *Barney v. Dewey*, 13 Johns. 226 [7 Am. Dec. 372]; *Tarleton v. Tarleton*, 4 Mau. & Sel. 20; *Clarke v. Carrington*, 7 Cranch, 322.

It is sufficient for the decision of this case that such is the rule of law, where one transfers to another a note and war-

rants it to be valid and given upon good consideration. The cases of *Warner v. McGary*, 4 Vt. 507, and of *Walker v. Ferrin*, Id. 523, though not directly deciding the question, as they finally turned upon other points, strongly indicate that the court intended to recognize such an application of the general principle.

In the first case, which was an action against the warrantor, Judge Williams says: "It was his duty to have furnished all the evidence in his power to enable the plaintiffs to maintain their suit. He was not at liberty to neglect or omit to procure this evidence, suffer the plaintiffs to fail of a recovery, and wait until he was sued on his warranty before he apprised the plaintiffs that such testimony could be found." To the same point are *Boorman and Johnson v. Jenkins*, 12 Wend. 566 [27 Am. Dec. 158], and *Barney v. Dewey*, 13 Johns. 224 [7 Am. Dec. 372]. If the suit had been brought by Carpenter against Mace in this state, and the warranty and notice had been proved as stated in the exceptions, it is clear that Pier would have been a privy to it, so that the judgment would have concluded him from afterwards contesting the merits of the controversy. Without deciding that mere notice to appear and defend the suit in another state would give the foreign court such jurisdiction as would bind the warrantor by the judgment, we think that the further facts which appear, namely, that Pier was present at the time and place of trial, and procured a continuance of the case to enable him to bring witnesses to sustain the action, so make him privy to the suit that he was not at liberty after that to refuse to have anything to do with the suit; but that he thereby became so subject to the jurisdiction, and so a privy to the suit, as to be concluded by the judgment. If there had been any fraud or collusion between Carpenter and Mace in procuring the judgment, or any advantage taken by them in such proceedings to deprive Pier of fairly maintaining his rights in the suit, then he would not be concluded by the judgment. But nothing of this kind is stated in the bill of exceptions.

3. It is urged by the counsel for the defendant that the agreement of Carpenter and Mace to go before the justice and join issue upon the note was in the nature of an arbitration; that the jurisdiction of the court was thus derived from the consent of the parties, and that Carpenter had no power to bind Pier to submit his rights to the decision of such a tribunal. The law which regulates and authorizes the proceedings in New York under the code of procedure, as proved upon the trial, shows that what the parties did in this case was merely the institu-

tion of a suit, without previous process, in a court established by law, and was not in the nature of an arbitration. It resembles the beginning of a suit in this state by the defendants accepting service of the writ. The proceedings in the justice's court were regulated by law, and the rights of the parties were preserved and protected the same as if the suit had been begun with the usual service of process. As Pier's rights could not have been impaired by this mode of proceeding, we see no ground for relieving him from the legal effect of the judgment.

4. The waiver by Carpenter of his claim to recover the amount of his note above the sum of one hundred dollars, and thus bringing the suit within a justice's jurisdiction, has also been urged as being such a departure from the ordinary course of legal proceedings as should have discharged Pier from all liability to appear in that suit. The case shows that by the laws of New York a plaintiff has the right to waive a recovery for a larger sum than one hundred dollars, and that when he does so, the justice has jurisdiction. If Pier's rights were impaired by such act of Carpenter, the judgment so recovered ought not to conclude him; but we do not perceive that he could have been thereby injured. The excess above the one hundred dollars which Carpenter waived he must lose. He can only recover of Pier the amount of the judgment rendered by the justice. As to the tribunal by which the suit should be tried—whether by a justice or a higher court—we think Pier had not the right to determine it against the consent of Carpenter, so long as Carpenter was willing to lose the amount of his claim above the justice's jurisdiction. If a new suit had been brought in a higher court, Carpenter must have been the nominal plaintiff, and thereby liable in the first instance for the costs. He might well refuse to enter upon such litigation. On the other hand, Pier had it in his power, by paying Carpenter the amount of the note, to control the note, and have it sued when and where he pleased.

The supreme court of this state has decided, in *Danforth v. Streeter*, 28 Vt. 490, and in *Herren v. Campbell*, 19 Id. 23, that a plaintiff may abandon a portion of his demand, may indorse a note to an amount below one hundred dollars, for the mere purpose of bringing his suit before a justice; and that the defendant is not entitled to have the action dismissed in order that a new one may be brought in the county court. The defendant in such a case, might insist upon a trial in a higher court for the same reasons that are here urged on behalf of this defendant.

The omission of the plaintiff to insist, till near the close of the trial, that the judgment was conclusive, and his introduction of testimony to show the note void, did not preclude him from making the request which he did in regard to the charge to the jury. The court was bound, whether requested or not, to charge the jury correctly as to the legal effect of the evidence.

We think the charge of the court erroneous in instructing the jury that the judgment of the justice in New York was, under the evidence as offered and claimed by the plaintiff, merely *prima facie* evidence against the defendant that the note was not given for a good consideration.

Judgment of the county court reversed.

FORMER JUDGMENT IS CONCLUSIVE EVIDENCE when pleaded; but when merely given in evidence, it is only *prima facie* evidence: *Wann v. McNulty*, 43 Am. Dec. 58; note to *Reynolds v. Stansbury*, 55 Id. 464. That judgment is conclusive between the parties thereto, see *Montesquieu v. Heil*, 23 Id. 471; *Taylor v. Barron*, 64 Id. 281; *Horton v. Critchfield*, 65 Id. 701; *Agnew v. McElroy*, 48 Id. 772: see extended note to *Doty v. Brown*, 53 Id. 355, as to when former judgment is conclusive.

CONCLUSIVENESS OF FOREIGN JUDGMENTS.—Judgments have no greater effect outside of the state than where they were rendered; but the judgments of sister states are entitled, under the constitution of the United States, and when properly proved and authenticated, to full faith and credit in the several states. The jurisdiction will be presumed in favor of a court of general jurisdiction, but it must be shown in the case of a judgment of a court of limited jurisdiction; and in the latter case everything will be intended in favor of the judgment, if the jurisdiction is shown. But the judgment of a court may be impeached anywhere for fraud or want of jurisdiction. These rules will be found sustained in the following cases, in which various limitations, qualifications, etc., are shown: *Fletcher v. Ferrel*, 35 Am. Dec. 143; *Wood v. Watkinson*, 44 Id. 562; *Davis v. Smith*, 48 Id. 279; *White v. Trotter*, 53 Id. 112; *McJilton v. Love*, 54 Id. 449; *Gunn v. Howell*, 62 Id. 785; *Taylor v. Barron*, 64 Id. 281; *Cook v. Thornhill*, 65 Id. 63; *Reid v. Boyd*, Id. 61; *Horton v. Critchfield*, Id. 701, and collected cases in notes thereto. In *Bartlett v. Knight*, 2 Id. 42, will be found an extended note on the effects of judgments of other states.

CONCLUSIVENESS OF JUDGMENTS OF JUSTICES OF THE PEACE: See body of collected cases in the note to *Billings v. Russell*, 62 Am. Dec. 331.

JUSTICE'S JUDGMENT IS AS CONCLUSIVE AS THAT OF ANY OTHER COURT in a case wherein he had jurisdiction. It is equivalent to a debt of record: *Mitchell v. Hawley*, 47 Am. Dec. 260, and notes thereto 263.

PRIVIES ARE THOSE WHO ARE PARTAKERS, or have an interest in any action or thing, or any relation to another: *Marr v. Hanna*, 23 Am. Dec. 449. Privy is also defined in the note to *Howard v. Kennedy's Ex'rs*, 39 Id. 311.

PLAINTIFF MAY WAIVE PART OF DEMAND, to bring it within the jurisdiction of an inferior court: See note to *Grayson v. Williams*, 12 Am. Dec. 570; but in *Bent's Ex'r v. Graves*, 15 Id. 632, it is held that he cannot give defendant a credit for that purpose without the latter's consent. But plaintiff cannot remit a portion of the verdict rendered, on appeal from a justice's court, in order to confer jurisdiction thereupon: *People v. Skinner*, 54 Id. 432.

THE PRINCIPAL CASE WAS CITED in *Martin v. Wells*, 43 Vt. 431, to the point that it is settled law in Vermont that a certified copy of the record of a justice of the peace in a sister state is the appropriate evidence of a judgment rendered by him.

ST. ALBANS BANK v. DILLON.

[30 VERMONT, 122.]

PROMISSORY NOTE MADE BY PRISONER IN FAVOR OF SHERIFF, WHO IS ALSO JAILER, for payment of fine and costs, is not void as against public policy.

PRISONER'S NOTE TAKEN BY JAILER IN PAYMENT OF FINE AND COSTS IS, in effect, so much money in his hands, and he becomes at once debtor for the fine and costs.

WHERE SHERIFF'S TAKING OF PRISONER'S NOTE VIOLATES NO STATUTE, is not taken to stifle prosecution, and in no way compromises the ends of public justice, the note must be held valid even in the hands of the sheriff, and much more so in the hands of a *bona fide* indorsee.

SURETY IS BOUND, THOUGH PRINCIPAL IS NOT, where the matter of defense in the hands of the principal is altogether of a personal character; such as infancy or coverture. In such a case the surety stands, in a certain sense, a principal promisor.

GOOD PERSONAL DEFENSE BY ONE JOINT DEFENDANT will not prevent a judgment against the remaining defendants.

ASSUMPSIT on a promissory note. Catharine Dillon, a *feme covert*, and one of the defendants, was convicted for a violation of law, and punished by fine and imprisonment. To pay the fine, she gave her note to the jailer, with the name of Edward McGowan as surety. The jailer indorsed the note to plaintiff. McGowan set up his co-defendant's coverture as a defense. Judgment was rendered in favor of Catharine Dillon for costs, and in favor of plaintiffs and against defendant McGowan for the amount of the note and costs.

Aldis and Burt, for the defendants.

H. G. and L. M. Edson, and H. R. Beardsley, for the plaintiffs.

By Court, BENNETT, J. We apprehend the defense set up to this note cannot be sustained.

It is claimed that the note in question is void, it being taken, as it is said, upon a contract made in contravention of sound policy. Burr, the sheriff of the county, and jailer, took the note payable to himself or order, in discharge of the fine and costs, for the non-payment of which Mrs. Dillon had been committed to jail, and she was thereupon discharged from her confinement. Whenever she paid the fine and costs, she was entitled to her liberty, and when the jailer took it upon himself to take the note, it was in effect so much money in his hands, and he at once became debtor for the fine and costs, as

much so as if she had paid him the amount in cash. The note became his own. The sheriff did not make use of legal process to oppress Mrs. Dillon; but what was done was matter of favor and indulgence towards her, and she should be the last to complain. The statute under which the penalty was incurred by Mrs. Dillon provides that the court may take security for the payment of the fine and costs before he issues a warrant, and it would seem to be a great stretch of authority to hold that the taking of this note was against sound policy, if the sheriff, of his own accord, elected to treat it as so much cash in his hands. When a case arises in which legal process has been made use of for oppressive purposes, it will be time enough to decide what the effect should be upon a contract obtained by means thereof. In *Sugars v. Brinkworth*, 4 Camp. 46, a warrant had issued to collect a penalty which had been incurred for a breach of the excise laws. The officer took a note for the penalty, and it was held the security was valid. Though in that case it was a conceded point by the court that if the officer had abused the process, he should not have been allowed to have enforced the note. This case is, we think, according to the whole current of authority. In the taking of this note no statute was violated. It was not taken to stifle any public prosecution, or in any way to compromise the ends of public justice, but rather in furtherance of the same, and to carry into effect the sentence of the law. This was the manifest intention of the jailer, and the legitimate effect of his action, and we think, upon the facts in this case, the note must be held a valid security, even in the hands of the sheriff, and much more in the hands of a *bona fide* indorsee: See *Dagnall v. Wigley*, 11 East, 45; *Kirk v. Strickwood*, 4 Barn. & Adol. 421, 24 Eng. Com. L. 91.

The fact that Mrs. Dillon was a *feme covert* at the time this note was given cannot have the effect to discharge McGowan as a several obligor. This may have been the very reason why security was required: See Bingham on Infancy and Coverture, 470, tit. Feme Covert, sec. 4; *Stevens v. Lyford*, 7 N. H. 360; 1 Parsons on Cont. 494.

It is a general rule that the extent of the liability of the principal measures and limits the liability of the guarantor; but when the matter of defense in the hands of the principal is altogether of a personal character, as infancy or coverture, such matter cannot avail as matter of defense for the surety. He, in such a case, stands, in a certain sense, as principal promisor: 1 Parsons on Cont. 494.

The statute of 1851 enabled the plaintiffs in this joint action to take their judgment against McGowan. The fact that the defendant Dillon had judgment for her costs against the plaintiffs is nothing to the other defendant, who alone was liable upon the note. McGowan is the only excepting party, and the judgment of the county court against him is affirmed with costs.

CASES IN WHICH SURETY IS OR MAY BE BOUND, ALTHOUGH PRINCIPAL IS NOT.—There are some cases in which the principal may be discharged, and the surety still be bound, although, as a general rule, whatever discharges the principal also discharges the surety: *Ames v. Maclay*, 14 Iowa, 284; *Jones v. Crosthwaite*, 17 Id. 396; *Smyley v. Head*, 2 Rich. 591; S. C., 45 Am. Dec. 750. An exception, however, to this general rule exists where the principal, when sued, takes advantage of a matter of defense which is altogether of a personal character, or where the extinction of the principal's obligation arises from a cause which originates in the law: *Johnson v. Planters' Bank*, 43 Id. 480; *Hicks v. Randolph*, 3 Baxt. 352; S. C., 27 Am. Rep. 760; *Kimball v. Newell*, 7 Hill, 117.

1. *Bankruptcy.*—The discharge of the principal as a bankrupt will not release the surety: *Moore v. Walter's Heirs*, 1 A. K. Marsh. 364; *Rountree v. Rutherford*, 65 Ga. 444. And the fact that the creditor has signed the bankrupt's certificate of discharge, even after notice from the surety not to do so, will not exonerate the surety: *Browne v. Carr*, 7 Bing. 506. So, in a suit against the principal and sureties on a bond given by a debtor arrested on execution, a discharge of the debtor in bankruptcy after breach of the bond will not avail the sureties as a defense: *Clafin v. Cogan*, 48 N. H. 411. So a discharge in bankruptcy of a judgment debtor, pending an appeal from the judgment, does not release the sureties to an undertaking, in the form required to stay execution, given upon the appeal: *Knapp v. Anderson*, 71 N. Y. 466; S. C., 7 Hun, 295. And a discharge of the bankrupt does not impair the remedy of a creditor against the sureties upon a bond given to dissolve an attachment issued more than four months before the commencement of proceedings in bankruptcy: *In re Albrecht*, 17 Nat. Bank. Reg. 287. Where the principal upon a promissory note has been adjudged a bankrupt, the surety is liable in an action upon the note, though it has been filed by the payee in the bankruptcy proceedings, and a judgment rendered for the allowance of his distributive share of the assets; and the action against the surety cannot be delayed until a final distribution of the assets: *Gregg v. Wilson*, 50 Ind. 490. Under the law of Louisiana, the principal's discharge in bankruptcy will not release the surety on an appeal bond from any obligation he incurs by signing the bond; but in determining what effect the discharge, in bankruptcy, of a principal debtor will have on the obligation of his surety, the courts of that state hold that they will be guided by the law of Louisiana, and not by the bankrupt law: *Serra e Hijo v. Hoffman*, 30 La. Ann. 67. Section 5118 of the United States revised statutes provides that no discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. References to and explanations of this section, in certain particulars, will be found in *Knapp v. Anderson*, 7 Hun, 295; S. C., 71 N. Y. 466.

2. *Infancy.*—The general rule, that whatever discharges the principal will discharge the surety, does not apply to the surety upon an infant's note, because the infant may successfully make the defense of infancy: *Conn v. Coburn*, 7 N. H. 386; *Hicks v. Randolph*, 59 Tenn. 352; S. C., 27 Am. Rep.

760. The doctrine of the civil law on this subject is very clear and satisfactory. It is as follows: "Although the obligation of a surety be only an accessory to that of the principal debtor, yet he who has bound himself surety for a person who may get himself relieved from his obligation, such as a minor, or a prodigal who is interdicted, is not discharged from his suretyship by the restitution of the principal debtor; and the obligation subsists in his person, unless the restitution were grounded upon some fraud, or other vice which would have the effect to annul the right of the creditor:" Dom., Strahan's ed., b. 3, tit. 4, sec. 1, art. 10. Again: "If the principal obligation was annulled only because of some personal exception which the principal debtor had, as if it was a minor, who, in consideration of his being under age, got himself relieved from an engagement by which he suffered some prejudice, and that there had been no fraud on the creditor's part, the restitution of the minor would have, indeed, this effect, that it would annul his obligation to the creditor, and his engagement to save harmless his surety, if he desired to be relieved from it. But the said restitution of the minor would not in the least invalidate the surety's obligation to the creditor. For it was only to make good the obligation of the minor, in case he should be relieved from it on account of his age, that the creditor took the additional security of a surety: Id., b. 3, tit. 4, sec. 5, art. 2.

3. *Want of Legal Power to Make Note.*—And on the same principle, if a corporation made a note which they had no power to make, sureties on that note would be held: *Gist and Scott v. Drakely*, 41 Am. Dec. 426. And this might be true even if the corporation were prohibited by their charter, or by some general statute, from issuing such a note. If, however, the issuing of the note were not only prohibited, but made a legal offense with a penalty attached, the whole paper with all its names might then be deemed void. The mere fact that the surety cannot in any such case, if he pays the note, have an enforceable claim for what he pays against the principal, defeats the holder's claim against the surety: 1 Parsons on Notes and Bills, 245.

4. *Coverture of Maker.*—If a party became surety for a married woman whose note is void because she could not make such a contract, the surety will nevertheless be bound: *Smyley v. Head*, 45 Am. Dec. 750; *Stillwell v. Bertrand*, 22 Ark. 375; *Kimball v. Newell*, 7 Hill, 116; *Maggs v. Ames*, 4 Bing. 470; *Whitworth v. Carter*, 43 Miss. 61; *Davis v. States*, 43 Ind. 103; S. C., 13 Am. Rep. 382. And this rule not only applies to minors and married women, but also to other persons incapable of contracting: *Allen v. Berryhill*, 27 Iowa, 539; *Hicks v. Randolph*, 3 Baxt. 352; S. C., 27 Am. Rep. 760; and extends to other obligations as well as to promissory notes: *Jones v. Crosthwaite*, 17 Iowa, 396.

5. *Effect of Fraud, Deceit, etc., in Procurement of Note.*—Where there is fraud, duress, deceit, or a violation of law or public policy on the part of the payee in procuring the execution of a promissory note, the surety will not be liable, although the principal may be discharged: *Davis v. States*, 43 Ind. 103; S. C., 13 Am. Rep. 382; *Osborn v. Robbins*, 36 N. Y. 365. This is true of gaming contracts, which are denounced by morals and public policy: *Whitworth v. Carter*, 43 Miss. 73.

HOW FAR INDORSER IS BOUND, THOUGH MAKER MAY NOT BE.—The indorser contracts that the original parties to the bill or note were competent to bind themselves, whether as drawer, acceptor, or maker; for otherwise, although ostensible, they would not be real parties to it. Therefore, if the drawer, acceptor, or maker became a party under duress, or were an infant, lunatic, or married woman, the indorser's contract is broken, and he may be

sued for recovery of the original consideration which has failed, or upon the instrument itself, without proof of demand and notice: *Bowman v. Hiller*, 130 Mass. 153; S. C., 39 Am. Rep. 442, a case relating to duress. A note given by a wife to her husband is void, yet if it is indorsed over by the husband, as between him and the indorsee, it is certainly good: *Haly v. Lane*, 2 Atk. 181. For another case holding that the indorser cannot set up as a defense that the maker of the note was a married woman, see *Archer v. Shea*, 14 Hun, 493. An indorser, when sued upon the contract between him and his indorsee, is not at liberty to deny the validity of the original note, or the capacity of the maker, for the purpose of defeating his own liability: *Kennworthy v. Sawyer*, 125 Mass. 29. In *Brwin v. Downs*, 15 N. Y. 575, a note was made by two married women, and indorsed by the defendant for their accommodation. He was held bound to a *bona fide* indorsee, although the latter knew that the makers were married women when he took it. Neither can a second indorser, in an action against him on a bill, dispute the legal capacity of the payee to indorse on the ground that she was a married woman: *Prescott Bank v. Caverly*, 7 Gray, 217; S. C., 66 Am. Dec. 473. The above principles are also borne out by the case of *Ogden v. Blydenburgh*, 1 Hilt. 182. So if the instrument purported to be signed by procuration, the indorser engages that there is competent authority in the agent. Thus in *Burrill v. Smith*, 7 Pick. 291, where the note was executed by the agent, who, as also the payee, was ignorant that his principal was dead, and the payee indorsed it, he was held. Parker, C. J., said: "The indorser always warrants the existence and legality of the contract which he undertakes to assign. The indorsee takes it chiefly on the credit of the indorser. Thus if a note, void between promisor and payee, on account of usury or other illegal consideration, is indorsed *bona fide* for a valuable consideration, the indorser must make it good. So if the indorsement is of a note made by a minor or *feme covert*, and even if the name of the promisor is forged, the indorser is held upon his contract to pay the indorsee." So the death and insolvency of the maker of a note before it falls due, there being no estate, or heirs, or administration, will render the indorser liable, and the insolvency may be proved by parol: *Clair v. Barr*, 12 Am. Dec. 391. It appears, from the preceding cases, that the indorser's liability is absolute; to pay at all events upon the default of the maker; but it will be observed that the surety's liability is not of such a binding character. While the latter will be liable, as above stated, in many cases where the principal is not bound, yet the elements of fraud, duress, or deceit, in the contract between his principal and another, will avail him as a defense as well as it may so aid the principal: *Osborn v. Robbins*, 36 N. Y. 365.

BARBER v. SLADE.

[30 VERMONT, 191.]

HUSBAND CANNOT CONVERT HIS WIFE'S CHOSSES IN ACTION TO HIS OWN POSSESSION without doing some positive act towards that end.

ACTS OF HUSBAND WHICH WILL NOT CONSTITUTE REDUCTION OF WIFE'S NOTE TO HIS POSSESSION.—Where the makers of a promissory note, given for the purchase of the wife's real estate, and made payable to her or bearer, deliver it to the husband, who immediately turns it over to the wife, she afterwards retaining the same in her possession, the note is

not converted by the husband, and the wife's property therein is not divested.

WHAT CONSTITUTES PAYMENT UPON WIFE'S NOTE.—Where husband and wife deed away wife's land, receive therefor a promissory note, and the wife agrees, with the husband's assent, that the makers of the note shall furnish her family with goods and apply them upon the note, articles delivered to the family, under this agreement, constitute a payment upon the note; but not so as to goods delivered under the husband's order to persons not members of the family.

BURDEN OF PROOF UNDER AGREEMENT THAT MAKERS OF PROMISSORY NOTE SHALL FURNISH GOODS for family use, and to be applied in payment thereof, is on the makers, when sued, to show what goods were delivered for such use.

ASSUMPSIT upon three promissory notes signed by the defendants and payable to the plaintiff or bearer. Plea, the general issue. Most of the facts appear in the opinion. It may, however, be stated that plaintiff's husband, E. D. Barber, died before the commencement of this suit, and it did not appear that any article in the defendants' account was delivered after his death. The whole of defendants' account exceeded the amount of the notes. No application was made of the defendants' account upon the notes, but E. D. Barber was frequently applied to by them for that purpose, and promised to have the application made on the notes.

Linsley and Prout, for the plaintiff.

O. Seymour and J. W. Stewart, for the defendants.

By Court, **ALDIS, J.** The court below charged the jury "that upon the execution and delivery of the notes by the defendants to E. D. Barber they became his absolute property, and it was competent for Barber to make any agreement with the defendants in relation to the mode of their payment."

The notes were given for real estate which Mrs. Barber inherited from her father, were made payable to her, and were, on the day of their execution, delivered to the husband of the plaintiff, who immediately thereafter delivered them to the plaintiff. Since their delivery to her they have always remained in her exclusive possession.

1. The goods furnished by the defendants at the plaintiff's request for the benefit of the family, and upon an agreement with her and her husband that they should apply in payment on the notes, should be allowed as payment. Such an agreement so acted upon was clearly binding upon her and her separate property, which, by the agreement, was to be affected by

it. The charge of the court does not seem to have limited the jury to an allowance of such part of the account, and no more.

2. The account which the defendants claim to apply as payment on the notes contains not only goods furnished for the use of the family upon the agreement with the plaintiff, but also goods not for the use of the family, delivered to persons not members of it, upon orders of the plaintiff's husband. And it does not appear that the husband agreed that such articles should apply upon the notes. His promise "to get the notes and have the application made" extended only to articles for family use. The articles not for family use could not apply upon the notes, unless the notes were his property, and not his wife's. The court charged the jury that upon the execution and delivery of the notes by the defendants to E. D. Barber they became his absolute property.

Whatever conflict of opinion upon this subject may have existed formerly, and in the early cases cited in argument, it is now settled in this state that the husband must do some positive act to reduce the choses in action of the wife to his possession, before they become his property; and the fact that the choses in action have passed into the custody and possession of the husband is not itself a reduction of them to possession. In the recent case of *Heirs of Holmes v. Administrator of Holmes*, 28 Vt. 765, it was held that although the wife handed the notes to the husband and requested him to keep them, and he did keep them among his own papers until after her death; and although she told him, before marriage, that the notes were all her means, and he, at her request, bought her a wedding dress, furniture for the house, etc.—yet all these facts did not constitute such a reduction of the notes to possession by the husband as to divest the wife of her property in them. In this respect the charge was erroneous.

In this case, we find no evidence tending to show any act of the husband indicating an intent to withdraw the notes from the control of the wife and to reduce them to his possession, but the contrary. It is therefore unnecessary to decide what acts of the husband are sufficient to constitute a reduction of the wife's notes to his possession, or to determine, if such acts were shown, whether the statute of A. D. 1850 would still preserve the separate property of the wife for her use.

The agreement which the plaintiff and her husband made with the defendants was that goods for family use should apply in payment on the notes. It appears that the defendants

kept no separate account of such articles, but so mingled them in the account with others that they were unable to distinguish them. It was the duty of the defendants to have kept the account so that the articles for the use of the family could have been distinguished from those not for such use. The burden of proof was on the defendants to show what the goods were which, by the agreement, were to apply on the notes, and the jury should have been instructed to allow only those articles which the defendants proved to have been for the use of the family.

As there must be a new trial of the case, and the counsel agree as to the rule of law which regulates the casting of interest upon accounts, and differ only as to the mode in which it actually was cast, we do not deem it necessary to consider that question.

The judgment of the county court is reversed

WHAT ACTS OF HUSBAND WILL AMOUNT TO APPROPRIATION BY HIM OF WIFE'S CHoses IN ACTION: *Coplinger v. Sullivan*, 37 Am. Dec. 575, and elaborate note thereto ventilating the subject; *Kaufman v. Cranford*, 42 Id. 323. Chose in action made in the wife's name is good, and the title vests in her: See extended note to *Boomer v. Addison*, 46 Id. 47. Promissory note is a chose in action: See note last cited, 51; but for circumstances under which the wife may pass title by her indorsement, see *Stevens v. Beals*, 57 Id. 108; *Krebs v. O'Grady*, 58 Id. 312, and notes to these cases. As in the principal case, the effect of the husband's reduction into possession of the choses in action of his wife depends upon the intention with which it is made; if he intends that the property in the proceeds shall remain in his wife, the law will not cast the ownership upon him perforce: See note to *Estate of Hinds*, 34 Id. 545.

ALLEN, ADAMS, & Co. v. HARRISON.

[80 VERMONT, 219.]

TESTIMONY OF WITNESS MAY BE IMPRACHED BY PROVING DECLARATIONS of party, whose witness he was, that the witness had made a statement contradictory to that made by him upon the stand.

COMMUNICATIONS TO ATTORNEY BY ONE NOT INTERESTED IN SUIT ARE NOT PRIVILEGED, though the communicator be a nominal party, and disclose facts in regard to the suit.

ASSUMPSIT for money had and received. Plea, the general issue. Alanson Allen, one of the plaintiffs of record, was introduced as a witness by the plaintiffs, Allen, Adams, & Co., and testified that in April, 1852, the plaintiffs were indebted to one John Dewey; and that Harrison brought Allen a note signed by Dewey, payable to Harrison, and dated December

19, 1851. Harrison told Allen, according to the latter's testimony, that Dewey wished the plaintiffs to take up the note, and Allen, supposing the note to be all right, took it from Harrison and paid him the amount of it out of the company funds. The plaintiffs' testimony, however, tended to prove that the note had been previously paid by Dewey to Harrison; and Harrison himself also testified that Dewey paid him the note in March, 1852, but denied that Allen either took the note from him or paid him anything thereon. Allen, on cross-examination, expressly denied that he ever told plaintiffs' attorney, Judge Kittredge, that he did not know how he came in possession of the note. About two years after this transaction, and before the commencement of this suit, the plaintiffs dissolved their partnership, and Allen assigned to the co-plaintiffs all his interest in all the affairs of the firm, and took a bond of indemnity for his security against all claims against the company. Defendant called the plaintiff Adams as a witness, and asked him if he had not said to Marcus B. Dewey, a son of John Dewey, "that Allen told him that he did not know how he came by the note in question." Adams replied, "No." The question and answer were objected to, but admitted. Marcus B. Dewey was then called by defendant, and testified, substantially contradicting the testimony of Adams. The introduction of this testimony plaintiffs also objected to. It further appeared that, after Allen had assigned his interest in the firm to his co-plaintiffs, Judge Kittredge, in whose hands the plaintiffs' claim against defendant had been left for collection, had a conversation with Allen as to how he obtained possession of the note; and defendant offered the attorney as a witness to prove the statements then made to him by Allen on that subject. This was objected to, on the ground that such statements were privileged communications, but the attorney's testimony was admitted.

D. E. Nicholson, for the plaintiffs.

L. C. Kellogg, for the defendant.

By Court, *PIERPOINT, J.* The case shows that on the trial Alanson Allen was offered as a witness by the plaintiffs and testified. The defendant then offered to prove the declarations of one of the plaintiffs that the witness Allen had given a different relation of the transaction testified to by him than the one sworn to on the stand; this was objected to by the plaintiffs, and admitted by the court.

That it was competent for the defendant to prove the fact that the witness had given contradictory accounts of the transaction, for the purpose of impeaching his testimony, will not be questioned; the objection in this case can only be to the manner of proving it; that is, by the admissions of the party.

If it is competent to prove the fact, we can see no reason why it may not be proved by the admissions of the party; there is nothing in the nature of the fact sought to be established that requires the application of any other rule of evidence than that applicable to the proof of any other fact important in the case.

The testimony of Judge Kittredge was also objected to by the plaintiffs, on the ground that the facts to which he was called to testify were communicated to him by one of the plaintiffs, as his attorney. This objection was well taken, if sustained by the facts.

The case shows that the witness obtained his information from a nominal party to the suit, but one who had no interest in it or control over it; and we think it apparent, from the facts stated, that the court were correct in deciding that the information was not communicated to the witness as the attorney of the party making the communication, and that it was properly admitted.

The judgment of the county court is affirmed.

IMPEACHMENT OF WITNESS BY PROOF OF PRIOR CONTRADICTIONARY STATEMENT MADE OUT OF COURT: See collected cases in note to *Wright v. Hicks*, 60 Am. Dec. 698; see also *Franklin Bank v. P. D. & M. S. N. Co.*, 33 Id. 687; *State v. Patterson*, 38 Id. 699; note to *Weatherford v. Weatherford*, 56 Id. 219; *Tucker v. Welsh*, 9 Id. 137; collected cases in note to *Blue v. Kibby*, 15 Id. 99.

PREDICATE FOR IMPEACHMENT OF WITNESS BY PREVIOUS INCONSISTENT STATEMENTS MADE OUT OF COURT: See rule and collected cases in note to *Nelson v. Iverson*, 60 Am. Dec. 449; see also *Sutton v. Reagan*, 33 Id. 466; *Franklin Bank v. P. D. & M. S. N. Co.*, Id. 687; *State v. Marler*, 36 Id. 392; note to *Whiteford v. Burckmyer*, 39 Id. 656; *State v. George*, 49 Id. 392; collected cases in note to *Blue v. Kibby*, 15 Id. 99, treating at length of impeachment of witnesses.

COMMUNICATIONS ARE NOT PRIVILEGED, WHEN: *Foster v. Hall*, 22 Am. Dec. 400, considering the extent to which the privilege should be carried; *Hutton v. Robinson*, 25 Id. 415, and note 420; *Beltzhoover v. Blackstock*, 27 Id. 330, and note 334; *Coveney v. Tannahill*, 37 Id. 287, and note 296; *Crosby v. Berger*, 43 Id. 117; *Bank of Utica v. Mercereau*, 49 Id. 189, and note 233.

STRONG v. ADAMS.

[30 VERMONT, 221.]

EFFECT OF EXCHANGING PLEDGE FOR OTHER PROPERTY.—Where a debtor leaves property with his creditor as security for a loan, with directions to sell it, deduct his debt, and pay the balance to the debtor, and the creditor, instead of doing so, exchanges it for other property, the property got by the exchange does not necessarily belong to the creditor, nor is it necessarily liable to attachment for the payment of his debts. The right of property is determined by the debtor's ratification or repudiation of the contract of exchange.

BAILMENT OF PROPERTY WITH POWER OF SALE IS PERSONAL TRUST TO BAILOR.

DEBTOR MAY REPUDIATE HIS CREDITOR'S EXCHANGE OF PLEDGED PROPERTY by bringing an action, within a reasonable time, to recover the original property pledged by him to secure his debt.

DEBTOR MAY RATIFY HIS CREDITOR'S EXCHANGE OF PLEDGED PROPERTY by bringing an action, within a reasonable time, to recover the property got by the exchange, and against one who has attached it as the creditor's property, unless there is evidence inconsistent with that of ratification.

TRESPASS IN CASES OF BAILMENT.—Unless the bailee has the absolute right to retain bailed property for a definite time, trespass may be brought against a wrong-doer to the property, either in the name of the bailor or the bailee. *Per Redfield, C. J.*

TRESPASS for a wagon. The facts are stated in the opinion. It may be added, however, that the exchanged wagon in Kimball's possession was attached by defendant as Kimball's property, and sold on an execution in defendant's favor against Kimball. Judgment for defendant.

R. R. Thrall, and Linsley and Prout, for the plaintiff.

M. G. Evarts, and Edgerton and Hodges, for the defendant.

By Court, REDFIELD, C. J. In this case, the plaintiff pledged the property of Kimball for the security of twenty-one dollars and fifty cents advanced by him, with the right to sell the property and pay over the balance of the price to the plaintiff. Kimball exchanged the property, being a horse and harness, for a wagon, and two dollars and fifty cents in money. The court held, as matter of law, that this vested the title of the wagon in Kimball, and that it was immediately attachable as his property.

We are not prepared to adopt this view of the law. If Kimball exceeded his authority in making the exchange, which, as the facts are stated, would seem to be the case, unless there was something in the evidence or course of dealing to show

that Kimball had a larger discretion than an ordinary factor, then it would be optional with the plaintiff either to adopt or repudiate Kimball's act in making the exchange. And his bringing the action is regarded as a sufficient ratification of the act ordinarily; as, if he had brought suit to recover his original property, it would have been a repudiation of the exchange.

What other facts may be put in the case hereafter, we cannot anticipate. It will no doubt be competent to show, by other evidence, that the plaintiff did repudiate the act of Kimball in making the exchange, or that he did not ratify it in a reasonable time, perhaps, as is intimated in the case of *Hunt v. Douglass*, 22 Vt. 128. But as there is nothing in this case to show any delay, or that any time intervened between the exchange and the attachment, and as the decision of the court goes upon the ground that the plaintiff had no rights, either absolute or contingent, in the property obtained by the exchange, we think there should be a new trial.

Something was said by the plaintiff's counsel in regard to the plaintiff's right to maintain this action of trespass, if the property had vested in him before the bringing of the suit. But no such point is insisted upon by the counsel for the defendant. And we understand the law to be well settled, that in cases of bailment, unless the bailee has the absolute right to retain possession of the property for a definite time, the action of trespass against a wrong-doer may be brought either in the name of the bailor or the bailee, but we do not here decide the point.

Judgment reversed, and case remanded.

BAILEE'S OR BAILOR'S RIGHT TO MAINTAIN TRESPASS: See note to *Oreer v. Storms*, 18 Am. Dec. 550, 550, 557; *Burdick v. Murray*, 21 Id. 588; *Root v. Chandler*, 25 Id. 546.

THRALL v. LATHROP.

[30 VERMONT, 307.]

PARTY IS NOT ESTOPPED BY ADMISSION MADE THROUGH INNOCENT MISTAKE OF FACTS in material points and in ignorance of his rights.

BAILEE PLEDGING ANOTHER'S PROPERTY WITHOUT AUTHORITY IS GUILTY OF CONVERSION; and both bailee and pledgee are liable in trover, whether the pledgee knew the real state of the title or not.

MEASURE OF DAMAGES WHERE BAILEE PLEDGES ANOTHER'S PROPERTY is the value of the property at the time of the conversion.

TROVER for a heifer. In 1849, the plaintiff let Alvah Preston have a cow and calf, under an agreement that Preston should

raise the calf for the use of the cow. The cow was returned in 1851. In 1853 Preston borrowed ten dollars of defendant, and pledged the calf, then nearly grown, for payment, and gave a bill of sale. The money was not paid, and defendant took possession of the heifer and kept her until November, 1854, when he sold her. Preston had also borrowed five dollars of plaintiff, and gave to him also a bill of sale of the same heifer; but the plaintiff did not know that the heifer was the one in controversy. The plaintiff did not take possession of the heifer, and she remained in the possession of Preston until taken by the defendant, after which the plaintiff informed him that the heifer was his property, and that he claimed her under his bill of sale. But it was found that the heifer in question was the one which came from the plaintiff's cow; that he was the owner of the calf when it was born, and that there was no evidence that he had ever sold the calf to Preston. Before the defendant took the heifer into possession, he was informed by Preston that the plaintiff had a bill of sale of her to secure five dollars, but that the five dollars had been paid, which was true, and that plaintiff retained the bill of sale and refused to give it up. Defendant refused to give the heifer up, and plaintiff brought suit. The heifer was worth seventeen dollars at the date of the conversion, and twenty-five dollars when defendant sold her. Judgment for plaintiff for twenty-five dollars, and interest from the time the defendant sold the heifer.

E. Edgerton, for the defendant.

The plaintiff, pro se.

By Court, REDFIELD, C. J. We understand that the plaintiff is proved in this case to have been the original owner of the animal in question, and never to have parted with his title. Is there anything in the case, then, which will estop him from now asserting his title against the defendant? This is claimed upon the ground that he did not assert any claim to the animal except upon a bill of sale, for the security of five dollars, which was shown upon the trial to have been paid, and that the defendant has acted upon the belief of the truth of this being the plaintiff's only claim of title, and will now suffer serious injury if the plaintiff is allowed to set up a new ground of claim not before disclosed.

There would be great force in this, if it appeared in the case that the plaintiff, at the time he was inquired of by the defend-

ant in regard to the nature of his claim to the animal, knew that it was the same animal which it ultimately proved to be. But this does not appear. And it is stated in the report of the referees that at the time the plaintiff took his bill of sale he supposed it to be a different animal.

The natural presumption is, perhaps, that the plaintiff was laboring under the same delusion when inquired of by the defendant as to his ground of claim, or the nature of his title. We certainly could not presume the contrary, against the judgment of the county court. And no party is estopped by an admission made in ignorance of his rights, induced by an innocent mistake of facts in material points. We think, therefore, the plaintiff is not precluded, by anything in the case, from setting up his title as against the defendant.

But in regard to the amount of the recovery, the defendant is only liable for the value of the property at the time of conversion, and interest after. There can be no doubt that the pledge of the animal by Preston to the defendant, under the state of the title disclosed at the trial, was a conversion of the property, both in Preston and the defendant, whether the defendant was aware of the facts or not. The defendant can only stand upon the title of his vendor, and his ignorance of the nature of that title will not enlarge his title. This is substantially decided in *Swift v. Moseley*, 10 Vt. 208 [33 Am. Dec. 197]. The plaintiff is therefore only entitled to recover the smaller sum reported.

Judgment reversed, and judgment for the plaintiff for the smaller sum reported, and interest from the date of the report.

ADMISSIONS AS ESTOPPEL: See note to *Jackson v. Pixley*, 57 Am. Dec. 65; *Titus v. Morse*, 63 Id. 665; *McAfferty v. Conover's Lessee*, 70 Id. 57, and cases cited in note thereto 61; *Mitchell v. Reed*, Id. 647.

BAILEE'S PLEDGE, OR SALE OF ANOTHER'S PROPERTY WITHOUT AUTHORITY, CONSTITUTES CONVERSION THEREOF: See notes to *Bailey v. Colby*, 66 Am. Dec. 758; *Wilson v. Little*, 51 Id. 314; *Crocker v. Gulliver*, 69 Id. 121. But the bailee may, by contract, acquire an assignable interest in the bailment: *Bailey v. Colby*, 66 Id. 752, and note 758.

CONVERSION, WHAT CONSTITUTES: See collected cases in note to *Webber v. Davis*, 69 Am. Dec. 90.

TROVER IS MAINTAINABLE FOR BAILED PROPERTY which the bailee has used for other purposes, or in a different manner from that designated in the contract of bailment: *Crocker v. Gulliver*, 69 Am. Dec. 118; *Stanley v. Gaylord*, 48 Id. 651; *Bailey v. Colby*, 66 Id. 752, and notes to these cases.

MEASURE OF DAMAGES IN TROVER: *Moody v. Whitney*, 61 Am. Dec. 229; *Angier v. Taunton Paper Manufacturing Co.*, Id. 436; *Wilson v. Little*, 51 Id. 307, and collected cases in notes thereto.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: In a conditional sale of chattels, the property to remain in the seller until the whole debt is paid, and where a lien is given to that effect, and recorded, a purchaser from the vendee will be charged with constructive legal notice of the facts, and good faith will not help him: *Morgan v. Kidder*, 55 Vt. 370. The rule of the principal case, that in trover the value of the property at the time of the conversion, with interest thereafter, is the rule of damages, was referred to in *Clement v. Spear*, 56 Id. 403; but it was there remarked that this rule was announced without discussion by the counsel or the court; and it was further said, in *Clement v. Spear*, *supra*, that all the authorities agree that the lapse of time from the commission of the wrong to the time of recovery may be considered by the jury in determining what sum will fairly compensate the party for the injury received; and that whether it is called interest or damages for the detention of the compensation which should have been paid at the time the wrong was inflicted makes no difference.

SPENCER v. HALE.

[30 VERMONT, 314.]

DELIVERY OF GOODS TO, AND THEIR ACCEPTANCE BY, CARRIER NAMED BY PURCHASER is a sufficient receipt and acceptance to take the sale out of the statute of frauds.

PURCHASER'S RIGHT TO REFUDIATE PAROL SALE OF GOODS MUST BE EXERCISED IMMEDIATELY upon their delivery to him, or he will be regarded as having accepted them.

BOOK-ACCOUNT. The facts are sufficiently stated in the opinion.

James L. Stark, for the defendant.

H. Canfield, for the plaintiff.

By Court, REDFIELD, C. J. This is an action of book-account to recover the price of a quantity of fence-posts sold by the plaintiff to the defendant, and by his direction delivered on board cars, at the railway-station in Shaftsbury, furnished by the defendant for that purpose; and which, by the station-agent at that place, were forwarded to the defendant at some place in the state of New York. There is nothing in the case to show that the parties contemplated a delivery or acceptance at any other place than Shaftsbury, and every reason to presume that they did not. It does not appear that the plaintiff knew to what particular place the posts were to be forwarded, or by what instrumentality, although it is probable he may have known more on these points than is stated in the report. He had nothing to do with the conveyance, either in selecting the carrier, or becoming in any way responsible for his conduct.

The delivery and acceptance were then perfected, as it seems to us, at the time the posts were sent from the station at Shaftsbury. It is undoubtedly true that the defendant, at that time and place, had a right to repudiate the posts after delivery. In other words, in order to perfect the case under the statute of frauds, something more is necessary than a mere delivery of the goods. In the language of the statute, the purchaser must "accept and receive part of the goods." But this may be constructive as well as actual, and it may be done through the instrumentality of an agent of the purchaser, as well as personally.

It was once held that a delivery to a common carrier not selected by the purchaser by the latter's direction was an acceptance by the purchaser within the statute: *Hart v. Sattley*, 3 Camp. 528. In this case the judge told the jury that the purchaser must be considered as having constituted the carrier his agent "to accept and receive the goods." But this case has not been followed in later cases: *Hanson v. Armitage*, 6 Barn. & Ald. 557; *Acebal v. Levy*, 10 Bing. 376.

But it seems now to be regarded as well settled, that if the purchaser name the carrier, he is bound by the delivery to such carrier. The carrier becomes his agent for the acceptance, and if the goods are accepted by the carrier and forwarded to the purchaser, he becomes liable for the price: 2 Parsons on Cont. 328, 329; *Bushell v. Wheeler*, 15 Q. B. 422. But this will depend upon the intention of the parties, to be gathered from the circumstances of each case, to some extent.

The present case is not different in principle from what it would be if the goods were to have been sent to New Orleans or to Liverpool, as it seems to us. In neither case would it be expected the seller would take the risk of the conveyance, or give the purchaser an absolute election whether to accept the goods on their arrival or not. This case, as it seems to us, is not different from what it would have been if the delivery were to have been made upon the grounds of the company about their station. The railway company had been directed by the purchaser to load them into cars. And in such a case there could be no ground to question that the removal of the goods, although by an agent, and that agent a common carrier, would be a sufficient receipt and acceptance.

Where each case is determined upon its facts, as cases must be upon this subject to a considerable extent, they will not always appear consistent with each other. There will be ex-

treme cases which seem to impinge upon the principle. But they cannot be followed any further than they follow the principle upon which they profess to go.

The cases all agree that the purchaser may so conduct as to waive the right of repudiation of the goods, which, under the statute, he undoubtedly possesses up to and at the time of delivery, and in some cases until the goods come to the actual custody of the vendee. In the present case, there is nothing to induce the court to believe that the parties probably contemplated any such right of repudiation after the goods left the station at Shaftsbury. It seems to us the more reasonable construction of the contract is that no such right was expected to have been exercised after that time. If not, then the omission of the defendant to exercise it at the proper time was a waiver of the right, and equivalent to its positive exercise by acceptance.

But if the contract could fairly receive the construction that the purchaser had the right of election after the arrival of the posts and an opportunity of inspection, it seems to us that he must be regarded, in the present case, as having acquiesced in the delivery and acceptance so long and in such a manner that his subsequent rejection cannot be held binding upon the plaintiff. For it seems that a day or two after the posts were forwarded the defendant was informed by the plaintiff of that fact, and that he then promised to send the money for the price, and gave no intimation of any dissatisfaction for about ten days, and never returned the posts.

It can hardly be supposed if the defendant had any such right of election after the arrival of the goods at their destination, that it could have been expected, under the circumstances, that he should have been allowed so long a time for its exercise, or that the plaintiff should be left to find his goods when he could, and return them at his own expense. In fact, the defendant's acquiescence is an acceptance. The cases all agree that even where the vendee has an election to repudiate the delivery, he must do it immediately, or he is bound by the acquiescence as an acceptance. The strongest case for the defendant read at the bar, that of *Hunt v. Hecht*, 20 Eng. L. & Eq. 524, holds expressly that the purchaser may, by his conduct, deprive himself of the option secured to him under the statute. This we think the defendant in this case did do, if this option were to have been exercised when the goods were delivered on board the cars, by allowing his agent to forward

them to him in New York; and if the election could have been exercised after the arrival of the articles, which it seems to us unreasonable to allow, then the right is expressly waived by the promise to pay, and impliedly by the delay. So that upon every ground it seems to us the plaintiff is entitled to recover the price of the posts.

Judgment is affirmed.

DELIVERY AND ACCEPTANCE SUFFICIENT TO TAKE PURCHASE OUT OF STATUTE OF FRAUDS: See *Snow v. Warner*, 43 Am. Dec. 417; collected cases in note to *Arnold v. Delano*, 50 Id. 579; *Houghtaling v. Ball*, 59 Id. 331; *Marcell v. Brown*, 63 Id. 605, and notes to these cases.

THE PRINCIPAL CASE WAS SUMMARIZED in *Gibbs v. Benjamin*, 45 Vt. 130, where it was said that authorities might be readily multiplied affirming the rule of the principal case in substantially the same language; but that it was of acknowledged authority in the courts of Vermont. In this case it was held that the mere delivery of the wood to the purchaser was not sufficient to take the case out of the statute of frauds. He had to accept and receive it; and it was enough that the purchaser refused to accept the wood to render the sale invalid under the statute of frauds. The principal case was also cited in *Strong v. Dodds*, 47 Id. 355, to the point that there must be both a receipt and acceptance by the purchaser of some part of the goods, when the sale is oral, to remove the statute disability; and it was said that with this all the authorities agree.

STATE v. DAVIDSON.

[80 VERMONT, 377.]

DECLARATIONS OF PERSON INJURED WHEN NO ONE IS PRESENT ARE NOT EVIDENCE to show the manner in which the injury occurred, however nearly contemporaneous with the occurrence.

DECLARATIONS OF PARTY THAT DEFENDANT ROBBED HIM, though made but shortly after the crime, if any, was committed, are not a part of the *res gestæ*, and are inadmissible to prove the *corpus delicti*.

CIRCUMSTANCES TENDING TO PROVE CORPUS DELICTI ONLY, and those tending to prove defendant's guilt only, should be separately presented to the jury and the effect of each stated, and it is error to instruct the jury that they may consider all the circumstances in the case together upon both questions.

WHEN CORPUS DELICTI IS SHOWN BY CIRCUMSTANTIAL EVIDENCE, it must be so established as to exclude all uncertainty or doubts from the minds of the jury.

INDICTMENT for assault with intent to kill, for assault with intent to rob, and for highway robbery. Davidson had hired one Baldwin to work for him, and he was to begin in a fortnight. Davidson, having a horse and wagon, offered to take

Baldwin part way home. Baldwin accepted, and they drove to a secluded spot on the road. After that Davidson was seen alone in his wagon, and Baldwin was found somewhat bruised lying by the roadside. He claimed that Davidson had assaulted him. He swore out a warrant for his arrest, but when the day for trial came was not present as a witness. The prosecution attempted to prove the charges in the indictment by circumstances, and introduced all the circumstances connected with the matter, and also the declarations of Baldwin, made when found by the roadside; all of which was objected to by the defendant. Defendant then requested the court to charge the jury that in order to convict, they must find that the crimes had been committed; but that the robbery could not be proved by circumstances or acts which did not necessarily tend to that result; as, that defendant knew Baldwin had no money; or that he hired him to work by an unusual contract; or that he went with him to a secluded piece of road; or that Baldwin was more hurt than Davidson; and that these matters could not be considered in deciding whether any crime had been committed. The court refused to so charge the jury, but instructed them that a crime must be proved, and that defendant was the perpetrator, before they could find a verdict of guilty; and that they might determine both of these points from the same evidence. The jury found a verdict of guilty.

B. L. Knowlton, state attorney, for the prosecution.

By Court, REDFIELD, C. J. 1. The first question is in regard to the admission of the statement of Baldwin, at the time he was first discovered by the witnesses.

It is well settled that the declarations of a party injured when no one is present are not evidence to show the manner in which the injury occurred, however nearly contemporaneous with the occurrence. Such declarations do not tend to characterize the transaction, and are, by consequence, no part of it, and cannot be admitted as such. This has been decided in this state with reference to injuries upon the highway when no one was present who could be a witness.

The declarations of the party are received to show the extent of latent injuries upon the person, upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations as to their effect, but they are not admitted as part of the *res gestæ*.

Hence, it clearly would not have been competent to show

that Baldwin said, when first discovered, that he had been robbed, or that he had been robbed by the respondent, although undoubtedly such a statement would have some effect in convincing the jury that such was the fact. But it is merely hearsay, and depends for its force wholly upon the veracity of the speaker and the circumstances under which it was uttered. And it does not tend to characterize any act of the party speaking.

The testimony objected to in the present case was simply an inquiry, in other words, if the witnesses had seen the respondent. And it is relied upon as equivalent to a declaration that Davidson had robbed him. It is indeed of less force than that, and is clearly inadmissible, upon the question of proving the *corpus delicti*, towards proving which it seems to have gone to the jury.

Can this be received as part of the *res gestæ*, which means, as part of the transaction? Of what transaction? it may be inquired. The transaction of the robbery, upon the theory of the government, was fully completed some time before this declaration was made. There was no transaction then in progress of which this declaration could form a part, unless it was the pursuit of the respondent by Baldwin. And it is difficult to see how that had any tendency to show that a robbery had been committed, however it might bear upon the question whether the respondent was the party whose agency had produced the injury, whatever it was. There seems to have been no great question that the respondent was the only party who had been with Baldwin after he was last seen a few rods east of the point where he was then found. And if the injuries to Baldwin were not accidental, of which there seems no great probability from the testimony detailed, it may be said there was not much question that the respondent had some agency in their production. But we do not perceive that the fact that Baldwin was pursuing the respondent tended to show that the case was one of robbery rather than of conflict. Baldwin would have been about as likely to pursue him in the one case as the other.

The mere fact of pursuit is not, then, competent evidence to prove the robbery, to which end it was suffered to go to the jury, notwithstanding the remonstrances of the respondent's counsel.

For so long as it is supposable that the injury may have happened by accident or possibly by other hands, the mere pursuit may have been to overtake the respondent as a friend

to gain relief. The pursuit of the respondent by Baldwin, being then consistent with more than one theory of the production of the injury, the fact does not tend to prove the case charged in the indictment. The *corpus delicti* must be assumed to be proved before the pursuit becomes of any importance; and the testimony having been objected to, and no instruction being given as to its effect, it possibly might have been viewed by the jury as possessing some intrinsic importance, from the mere fact that it was ruled in, notwithstanding objection, which otherwise it would not have had in their minds; and as it went into the case, and was left to the jury as tending to prove the *corpus delicti*, is impossible to maintain its competency. And we do not decide that it had any legal tendency to identify the guilty party. But if it were confined to that point, and that were the only difficulty, I could, I think, make it a circumstance of some slight weight, and legitimately entitled to be considered if left to the jury upon that point only.

2. But the charge of the court seems to us to have been fatally defective.

The court, even when specially requested, expressly declined to instruct the jury in regard to any separation between the circumstances which tended to prove the *corpus delicti*, and those which went to identify the guilty party.

This was certainly important and usual in all criminal trials, where there is any doubt of the commission of the crime alleged. And some of the circumstances enumerated in the request did not tend to prove the offense, *e. g.*, Davidson's knowledge that Baldwin had money about his person, or the contract he made with Baldwin, or Davidson's appearance when he was arrested, or Baldwin's inquiry for Davidson, as we have before said: And the jury were not told, what the cases all require, that when the *corpus delicti* is attempted to be shown by circumstantial evidence, it must be so established as to positively exclude all uncertainty or doubt from the minds of the jury. Not that each particular circumstance must be of this conclusive character, but all combined must produce the same degree of certainty as positive proof.

Verdict set aside, and new trial granted.

EVIDENCE IS NOT ADMISSIBLE AS PART OF RES GESTÆ, as a general rule, unless it grows out of the principal transaction, illustrates its character, and is contemporaneous with it: *Batton v. Watson*, 58 Am. Dec. 504, and cases in note thereto on the admissibility of evidence as part of the *res gesta*. Declarations accompanying act and inadmissible in evidence are inadmissible as

part of the *res gestæ*; and the declarations of a competent witness are inadmissible, except when part of the *res gestæ*: *Gilbert v. Gilbert*, Id. 268. But the declarations of a party are admissible as part of the *res gestæ*, if made at the time of an act done by him and explanatory thereof, where evidence of such act is itself admissible: *Wetmore v. Mell*, 59 Id. 607. Mere narration of event after it is fully ended does not form part of the *res gestæ*: *Innis v. Steamer Senator*, 54 Id. 305.

CIRCUMSTANTIAL EVIDENCE IN CRIMINAL CASES: See extended note to *Ripsey v. Miller*, 62 Am. Dec. 181; *Findley v. State*, 36 Id. 557; *Commonwealth v. Webster*, 52 Id. 711, and notes 737.

CORPUS DELICTI, PROOF OF, BY CIRCUMSTANTIAL EVIDENCE: See extended note to *Ripsey v. Miller*, 62 Am. Dec. 181.

NUTT v. WHEELER.

[30 VERMONT, 436.]

TROVER IS NOT MAINTAINABLE AGAINST OFFICER OR AUTHORIZED PERSON FOR MERE NEGLIGENCE TO TAKE PROPER CARE OF ATTACHED PERSONAL PROPERTY; neither will such neglect render him a trespasser from the beginning.

OWNER'S PROPER REMEDY FOR OFFICER'S NEGLIGENCE IN TAKING CARE OF PERSONAL PROPERTY WHILE UNDER ATTACHMENT is a special action on the case.

CONVERSION, AND EVIDENCE THEREOF.—A lawful taking is no conversion. So mere negligence of officer in taking care of attached personal property is no evidence of conversion.

INTOXICATING LIQUOR, HELD BY ONE WHO CLAIMS TO HOLD IT FOR LAWFUL PURPOSE, IS SUBJECT TO ATTACHMENT for his debts, like other property, and may be sold for a lawful purpose, on an execution against him. And the officer who has attached it, in a suit against the owner, is not precluded, by the fact of its being intoxicating liquor, from justifying such attachment in an action of trover, brought by the owner against him.

TROVER for a cask of gin, which was attached by the defendant, as an authorized officer or person, upon a writ against the plaintiff. This was an attachment suit brought by a liquor dealer named Ostheim, who had previously sold the gin to plaintiff, a hotel-keeper, to be paid for when it was used up. The cask was unopened at the time of the attachment, some three months after the sale. Defendant testified that when he made the attachment, the plaintiff said he had not bought the gin, but that it had been sent to him by Ostheim, and that he should let Ostheim have it again when he was next at that place if he would pay the freight on it. But the plaintiff testified that he told the defendant when he attached the gin that he had bought it, but that he was not to pay for it until he had used it; and that he did not buy it to furnish to his guests in

the hotel, but for his own use and that of his family. He further testified that he did not purchase the gin with any intention of putting it to an illegal use. Wheeler took the gin and deposited it in his own house for safe-keeping, and made a return on the attachment. The suit by Ostheim against Nutt to recover the price of the gin resulted in a nonsuit. Nutt then demanded the gin of Wheeler; but prior to this demand, the gin had been taken from Wheeler's house, during his absence, by Ostheim's agent, and sold by him to the authorized agent of the town of Bethel for selling liquor under the statute. When the defendant attached the cask, it contained forty-two gallons of gin; but when it was sold to the town agent of Bethel it contained but thirty-five gallons, seven gallons having been taken out by some one, or having leaked out or evaporated. Plaintiff had no license or authority under the law to sell, furnish, or give away intoxicating liquors. Upon these facts, the court inferred that the plaintiff, with Ostheim's knowledge of his purpose, bought the gin to use as a beverage, and mainly to furnish to his guests. Judgment for defendant.

Washburn and Marsh, for the plaintiff.

A. P. Hunton, for the defendant.

By Court, BENNETT, J. It is assumed by the plaintiff's counsel in this case that this cask of gin was the property of the plaintiff; that it was not purchased by him in contravention to the statute law of this state, and that upon the face of the bill of exceptions there was no evidence tending to justify the finding of the court below; that the plaintiff bought this liquor mainly to furnish to his guests, in violation of the statute. If we admit all this assumption to be well founded, it necessarily raises the question whether upon that assumption this action can be sustained against this defendant. We find that the defendant, on the fifteenth of January, 1855, attached this cask of gin on a writ against the present plaintiff and in favor of Ostheim, of New York, which he was duly authorized to serve; that under the process the liquor was taken by this special officer and deposited in his own cellar, and the writ was duly returned to the magistrate, and the cause continued from time to time until the twelfth day of March, 1855, when the plaintiff became nonsuited.

It is clear that this defendant was guilty of no wrong in attaching and carrying away this liquor, and that this action cannot be maintained for the taking, unless he became a tres-

passer *ab initio*. A lawful taking is no conversion. There is nothing in the case subsequent to the taking that can make the defendant a trespasser from the beginning. If he was guilty of negligence in taking care of this liquor so as to preserve it for the plaintiff, upon the dissolution of the attachment, it was a non-feasance, as was held in the case of *Abbott v. Kimball*, 19 Vt. 558 [47 Am. Dec. 708], for which trover will not lie, as was there held. The remedy would be in case for the negligence. It appears, it is true, that the plaintiff made a demand upon the defendant for a return of the gin after Ostheim had entered his nonsuit, but before that Ostheim, by his agents, had, in the absence of the defendant from home, taken the liquor away from his cellar and sold it. The failure of the defendant, under such circumstances, to deliver the gin to the plaintiff was no evidence of conversion.

As to the seven gallons that were found missing, when the agents of Ostheim sold the gin to the town agent, the case finds "it had been taken out by some one, or had evaporated, or leaked out." This, to be sure, may be thought to be a misfortune, and if it happened for want of care in the defendant, he would be liable in case for the negligence, but to charge him in trover for it, there must be something more than a non-feasance, and this must have been found by the exceptions.

We cannot presume it for the sake of reversing a judgment of the county court. But it was said in the argument that this liquor was not subject to attachment, and that therefore the defendant cannot justify the taking under his process.

But why not? It is assumed by the plaintiff's counsel that it is property, and held by the plaintiff for a lawful purpose, and if so, it should be protected in his hands, and subjected to his debts, in common with his other property. It could be sold on the execution for a lawful purpose, and we can hardly presume, in the absence of proof, an intent to sell it for an unlawful purpose, and thereby contaminate the attachment.

In this view of the case, the judgment was right below, and it is of no importance to consider any other questions arising on the bill of exceptions.

Judgment affirmed, with costs.

TROVER WILL NOT LIE AGAINST ATTACHING OFFICER FOR NEGLIGENCE in not taking proper care of the property attached: *Abbott v. Kimball*, 47 Am. Dec. 708, and note 711, citing the principal case.

OFFICER, WHEN TRESPASSER AB INITIO: *Paul v. Slason*, 54 Am. Dec. 75, and note 80; note to *Dickson v. Parker*, 34 Id. 80; *Heald v. Sargeant*, 40 Id. 694.

ANY ACT WHICH DEPRIVES OFFICER OF CONTROL OF ATTACHED PROPERTY will subject the person who does it to an action for such property: *Nichols v. Patten*, 36 Am. Dec. 713; and trespass or replevin will lie for a tortious taking: *Haythorn v. Rushforth*, 38 Id. 540.

CONVERSION, AND EVIDENCE THEREOF: *Webber v. Davis*, 69 Am. Dec. 87, and notes 90.

SPIRITUOUS LIQUORS ARE PROPERTY, at least until they are judicially and finally confiscated and ordered to be destroyed: *Fisher v. McGirr*, 61 Am. Dec. 381.

CITATION OF PRINCIPAL CASE.—Where property has been attached, and final judgment is rendered in favor of the defendant in the suit in which the attachment was made, trover will not lie against the attaching officer for neglect in not keeping and taking suitable care of the property attached. Such neglect is a mere misfeasance, and the proper remedy is in case for negligence: *Timber v. Morrill*, 39 Vt. 482.

CONNECTICUT AND PASSUMPSIC RIVERS RAILROAD COMPANY v. COOPER.

[30 VERMONT, 476.]

RESIDENCE OF RAILWAY COMPANY, for purpose of bringing actions as plaintiff, is in the county or town upon the legally defined route of their road where their principal office and the center of their business operations is situated. This principle also applies to banks, manufacturing and steamboat companies; and to an ordinary partnership in fixing the place of its liability to taxation for personalty.

RESIDENCE OF CORPORATORS DOES NOT INFLUENCE the question as to the location or residence of the corporation to which they belong.

RESIDENCE OF RAILWAY COMPANY IS LIMITED to the range of the legally defined route of their road, where their charter fixes no locality. And this principle applies to all other corporate companies.

RAILROAD CORPORATION HAVING NO RESIDENCE IN CERTAIN COUNTY CANNOT THERE MAINTAIN SUITS against residents of other counties.

ASSUMPSIT to recover of the defendant three assessments upon ten shares of the plaintiffs' capital stock, for which the defendant had subscribed. The writ was made returnable in Windsor county. Defendant pleaded in abatement that neither plaintiffs nor defendant were residents of Windsor county when suit was brought, but, on the contrary, alleged that both were residents of Orleans county. Plaintiffs replied that their charter authorized them to construct a railroad from Windsor county to the north end of the state in Orleans county; that when suit was commenced, their railway was constructed and in operation in Windsor and other counties on the line; and that several shareholders in the plaintiffs' capital stock, nam-

ing them, resided in the county of Windsor. The company had no office in Windsor county, except its ordinary stations, but had a general office in Orleans county. Defendant demurred to the above replication. Judgment was rendered *pro forma* that the plea was sufficient, and the replication insufficient. Plaintiffs excepted.

Washburn and Marsh, for the plaintiffs.

Peck and Colby, for the defendant.

By Court, REDFIELD, C. J. The question presented in the present case is, Where may a railway company be said to reside, for the purpose of bringing actions as plaintiff? There is no express statute upon the subject, except the general provision requiring actions to be brought in the county where one of the parties reside, if both reside in the state, as in the present case.

The statute of 1853, allowing actions against railway companies to be brought in any county into which their route extends, seems to have no proper bearing upon the question, inasmuch as this special provision in regard to railway companies defendant is rather an implied expression of the sense of the legislature not to extend the same rule to actions in favor of such companies by any express enactment, or else we should expect the provision would have been made general in the first instance. We conclude, then, that, strictly speaking, it can have no proper bearing upon the question.

The same may be said of the recent statute in this state, fixing the locality of railway companies, for the purpose of bringing actions, to the place of their principal business center. It has no other effect than similar statutes in other states, which do, indeed, when found to be uniform, tend to show the general sense upon the subject.

Some question is made in regard to the form of the pleadings in the present case. But we have not attempted to be very critical with either the plea or the replication, inasmuch as both parties seem desirous that the question involved should be determined. We think it may fairly be said that the plea and replication, taken together, present the following facts, so pleaded as to be admitted by the demurrer: —

1. That the defendant resides in Orleans county; that the plaintiffs' road extends through Orleans, Caledonia, and Orange counties, and part of Windsor county.

2. That they have an office in Orleans county. But as the presumption or implication is against the pleader, which is the

defendant in this case, we must conclude that it is not the principal office of business of the company.

3. That the company have no such office of any kind in the county of Windsor, except, perhaps, their ordinary way-stations, to which no allusion is made in the pleadings upon either side, and which may well enough be presumed to exist, notwithstanding the averments in the pleading.

4. That some of the corporators do reside in the county of Windsor.

The question is, then, whether it sufficiently appears by the pleadings in the case that the company has no such locality in the county of Windsor as will enable it to maintain actions in that county against residents in other counties.

1. It is obvious, we think, that the residence of the corporators can have no influence in regard to the locality of the corporation. The corporators in this company are the owners, for the time being, of the shares in the capital stock. This interest is merely that of a chose in action, a right to share ratably in the surplus or net earnings of the company. It will be obvious that the residence of the corporators in such a company could have no proper bearing upon the question of the locality of the company. The shares might all be owned by non-residents, or by the residents of other counties than those through which the road runs.

2. We think it safe, as a general rule, to say that a railway company, if it have any place of residence, must be limited to the range of its legally defined route. This is certainly in analogy to all other corporate companies. They are held to have their *situs* or residence where the principal business is transacted. This is so in the case of banks, manufacturing companies, and many others, and although these companies may, for some purposes, transact business out of the range of their ordinary locality, as they sometimes do, even in other states and counties, they are still regarded as having a fixed *situs* at the place where their principal business is done.

3. We think the same rule must govern in regard to railways. They all have certain centers, or one general center, of their business operations, and this almost of necessity confined to their route and its branches. In one case, it is held that where the company locate their principal business offices in a city not upon their line, that the company may be regarded as having its *situs* or residence, for the purpose of maintaining actions, in that county: *Bristol v. Chicago and Aurora R'y*, 15

¶1. 437. The court in this case say, in delivering judgment, that the residence of the company, for the purpose of maintaining actions, may be regarded as extending wheresoever it performs its functions and exercises its franchises. But we are not prepared to adopt this view. The general principle of the decision, within reasonable limits, we regard as sound. And it is maintained in the other cases cited in argument by the defendant's counsel. And it does not seem to us that the cases cited by the plaintiffs' counsel, wherein corporations have been held to be liable to taxation as owners of real property, in the place of its locality, conflict in any sense with this general view. It seems to us, as before intimated, very questionable how far this rule should be so applied to railways, which are necessarily local, as to give them a residence or *situs* beyond the limits of their line. Cases may be supposed where this may seem plausible, but it seems to us a somewhat questionable test of locality when carried to that extent.

But we are certainly not prepared to wholly disregard it as a test of the proper locality of such a corporation upon questions of residence affecting the liability to taxation for personality, or the right to maintain suits. We think, in the cases of those companies which have one principal center of business, there can be no question that it is to be regarded as the *situs* or residence of the company for such purposes. Where they have more than one such center along their line, they might, with some propriety, be allowed to sue on that ground in different local jurisdictions. But we are not prepared to extend this subdivision of locality to all the subdivisions of the business of the company, so as to give the company a residence at every way-station, or throughout its whole line. No case has adopted any such rule, and we are not prepared to do it.

It seems to us that the fact that the business of a railway extends throughout its road, no more defeats its locality or *situs* being determined by the place of its principal business office than in the case of other corporations, more or less analogous. The case of a bank or manufacturing company, although differing in its general functions from those of a railway, yet may serve to illustrate the point. One important function and franchise of banking companies is, almost of necessity, under the present arrangement of business, performed in the great commercial cities of the continent, where all currency centers, and where to be of value it must be readily convertible into specie equivalents. And it often becomes necessary for

such foreign banking companies in the cities to perform there many of their important offices, such as purchasing specie and negotiating bills, protesting for non-payment, and instituting suits. The same is true in regard to much of the business of manufacturing companies in converting their fabrics into money.

In the case of steamboat companies chartered for the navigation of lakes and rivers, their business is of necessity extended over their line much in the same mode as that of railway companies. But none of these things have ever been regarded as affecting the *situs* of the companies. If their charter fixes no locality, they are regarded as having their *situs* in the place of their principal office, at the center of their business operations. And it seems to us beyond all question that from the course of decisions, as well as of legislation, and the general convenience of business, the same rule should be applied in determining the *situs* of a railway company. The same rule has been applied to an ordinary partnership in this state in fixing the place of its liability to taxation for personalty: *Fairbanks v. Kittredge*, 24 Vt. 9.

Judgment affirmed.

RESIDENCE OF CORPORATION: See *Saugamon etc. R. R. Co. v. County of Morgan*, 56 Am. Dec. 497, and collected cases in note 501; note to *Baltimore etc. R. R. Co. v. Gallahue's Adm'rs*, 65 Id. 283.

NORCROSS v. RODGERS.

[30 VERMONT, 583.]

HUSBAND IS BOUND TO SUPPORT AND MAINTAIN HIS WIFE, and is entitled to her labor and earnings, while they live together in the usual course of the marital relation.

HUSBAND CANNOT RECOVER HIS WIFE'S EARNINGS FROM ONE who has employed and paid her, where the wife has for a considerable period, voluntarily and without good reason, lived apart from her husband, and supported herself without any assistance from him, and where the husband, prior to the payment to the wife, did not claim her earnings.

BOOK-ACCOUNT. The plaintiff's claim was for the services of his wife, who worked for the defendant under the following circumstances, as found by the auditor: Plaintiff's wife left him voluntarily about two years before she was employed by the defendant. The cause for the separation did not appear. During the two years she had taken care of herself. She worked a time for defendant, who paid her a fair compensation for her labor. Her earnings were needed for and applied to her immediate necessities for clothing and support. Defendant's deal-

ings were entirely with the wife, without notice, consent, or dissent from her husband. Judgment for defendant.

Ormsby and Farnham, for the plaintiff.

C. B. Leslie, for the defendant.

By Court, POLAND, J. The general principles that a husband is bound to support and maintain his wife, and that he is entitled to her labor and earnings, are undisputed; and while they actually live together in the usual course of that relation, very little difficulty arises in the application of these principles; but in cases where the legal relation still subsists, but the parties have, in fact, become alienated and separated, and their interests conflict with each other, cases of great perplexity arise. In the present case, it seems from the auditor's report that the plaintiff and his wife had been living apart for a considerable period of time before she commenced the service for the defendant for which the plaintiff seeks to recover. The report is very meager and bare in relation to all facts and circumstances attending the separation, and the cause of it. The auditor says that "she left him," and that "she left voluntarily," but for what cause did not appear. We think that from this we are to infer that she was not forced or compelled to leave the plaintiff, but not that it was wholly by her own fault, and without any cause or fault on the part of the plaintiff. The fair inference probably is, that it was the mutual fault of both that they could not agree to live together. Clearly enough, what is reported by the auditor would not be sufficient to authorize a third person to sue the husband, and recover for necessities furnished by him to the wife. In order to enable one to do that, when a wife lives apart from her husband, it must be shown either that they live apart by mutual consent, or that the separation is by the fault of the husband, and that he has not supplied her with proper necessities, or the means of procuring them.

The plaintiff's counsel treat the question whether the plaintiff would be bound by his wife's contract for necessities, under the circumstances detailed in the report, as to the separation and its causes, as synonymous with the question whether he is entitled to recover for her services during the same period for which payment has in good faith been made to her by the person employing her; and all the authorities quoted by the plaintiff's counsel have been to show that the plaintiff would not have been bound to pay for necessities furnished to her. But we think the questions are by no means the same, but depend

upon quite different principles. Before any person would be authorized to furnish her with necessaries, and rely upon the husband for payment, he would be bound to ascertain the true state of affairs between the husband and wife, whether she was not already provided with necessaries, or the means to obtain them, by him, and if she was not, whether it was not her fault; and, should a person employing the wife, and making payment to her, resist the husband's claim to her wages, upon the ground that she was not supplied by her husband, and was entitled to her wages to procure necessaries, he would doubtless be held to the same rule of proof. But in employing her, and paying her for her services, or supplying her with necessaries, and receiving pay from her therefor, when no claim is sought to be established against the husband, the right depends upon quite different principles.

Even when husband and wife are living together, if he allows her to deal in a particular manner, or to perform services and receive pay for them herself, the husband's assent to such dealing has often been presumed, and we think, where a separation for any cause has taken place, and for any considerable time, the husband had allowed the wife to deal for herself and receive pay for her services without objection, persons would have a right to consider him as assenting to such course of dealing by her.

The auditor reports that after she left her husband, up to the time of her service for the defendant, she worked at various places and took care of herself.

The fair import of this is, that she received the wages of her labor and expended it for her own support.

The period of her labor for the defendant covered over a year and eight months, but during all this time, and during her former service for others, it does not appear that the plaintiff ever interfered, or claimed any of her wages, or expressed any dissent to this course of dealing by her; and from this state of facts the defendant might properly infer that the plaintiff assented to her thus receiving her wages and expending them for her own support. The auditor, to be sure, says the defendant's dealings with the wife were without any assent or dissent by the plaintiff, but this evidently intends any express assent or dissent, and leaves in full force his silence and non-interference, not only in former years, but during her service for the defendant, as ground for belief by the defendant that the plaintiff did not intend to claim the wages of the wife,

and that he might safely pay her. It is very probable that if the plaintiff had notified the defendant, before payment to the wife, not to pay her, and that he claimed her wages, the defendant might not have been justified in paying her, but we think he cannot be permitted to keep silent so long a time, and till after full payment to her, and an expenditure of the money by her, and then come in and recover her wages. It would be practically a fraud upon the defendant to permit it. Judgment affirmed.

HUSBAND'S DUTY IS TO SUPPORT HIS WIFE, or to pay those who do so in a reasonable manner: *Cunningham v. Irwin*, 10 Am. Dec. 458, and extended note 462 thereto, discussing the liability of the husband to maintain his wife, showing the effect of separation upon this duty, etc. To the same points, see also *Walker v. Simpson*, 42 Id. 216; *Billing v. Pilcher*, 46 Id. 523; *Callahan v. Patterson*, 51 Id. 712; *Mitchell v. Treanor*, 56 Id. 421, and cases collected in notes thereto.

CITATION OF PRINCIPAL CASE.—In *Brown v. Mudgett*, 40 Vt. 71, it was laid down as a general proposition, that if a wife purchases, on the credit of her husband, necessaries for her own use, the husband is bound to pay for them; but that if the wife refuse to live with her husband and desert him, in violation of her duty, and without reasonable or just cause, she cannot bind him to pay for necessaries furnished her by a party knowing that they live separate and apart. And the principal case was cited to the point that before any one would be authorized to furnish her under such circumstances, relying upon the husband for payment, he should make inquiry and ascertain the true state of affairs between them—whether she was not already provided for, or with the means to obtain necessaries, by and through her husband, and if not, whether it was not in consequence of her fault.

WATERMAN v. CONNECTICUT AND PASSUMPSIC RIVERS RAILROAD COMPANY.

[30 VERMONT, 610.]

UPON PENDING ACTION BEING SUBMITTED TO REFEREE, and the submission made a rule of court, plaintiff must proceed for the same cause of action named in his declaration.

QUESTIONS OF VARIANCE BETWEEN DECLARATION AND PROOF ARE CONSIDERED AS WAIVED by reference, provided that the matter set up as the plaintiff's ground of recovery before the referee is that for which he sued.

PLEADINGS BEFORE REFEREE.—Every matter which, by the rules of law, could properly have been introduced by way of amendment to the declaration will be considered to have been added, and its absence waived or cured by the reference.

VARIANCE BETWEEN DECLARATION AND PROOF, where defendants are charged with obstructing and turning a watercourse on plaintiff's land, and the

proof is that defendants allowed their ditch to become so filled up as to throw an accumulation of water on plaintiff's land, is not so great but, by amendment, plaintiff's declaration might be made to cover all the facts.

IN APPRAISEMENT OF DAMAGES FOR LOCATING RAILWAY ON ONE'S PREMISES, every injury is included that the owner would suffer by the construction of the road in a reasonable manner, and its continuance with care and prudence.

PRUDENCE AND CARE MAY REQUIRE RAILROAD COMPANY TO KEEP OPEN DITCH to prevent an accumulation of water on the land adjoining the track and owned by other parties, but it is a question of fact, and not of law.

CASE for obstructing a watercourse on plaintiff's farm. The facts are stated fully enough in the opinion.

A. Howard, and Peck and Colby, for the defendants.

Ormsby and Farnham, for the plaintiff.

By Court, **POLAND, J.** The defendants' first objection to the recovery of the plaintiff upon the report of the referee is, that the facts reported as found do not sustain the charge made by the plaintiff in his declaration. It is doubtless true that where a pending action is submitted to a referee, and the submission is made a rule of court, that the plaintiff must proceed for the same cause of action named in his declaration, and will not be permitted to abandon that cause of action, and go for another for which the suit was not brought. But this is an objection that must go to the very substance of the action, and to the identity of the cause of action itself.

All questions affecting the mere form of the suit, and all questions of variance merely between the declaration and proof, are considered as waived by the reference, provided it sufficiently appears that the matter set up as the plaintiff's ground of recovery before the referee is the same real cause of action for which he sued. Many cases of this character have been before the court, and the court have finally settled the rule, in repeated cases, that every matter which by the rules of law could properly have been introduced by way of amendment to the declaration will be considered as having been added, and its absence waived or cured by the reference. The rule established by the court in repeated cases, as to the power of the court to allow amendments, only limits it to the same cause of action, and form of action, and the same parties to the suit; defects of any other character, to any extent, may be cured by amendment. In the present case, the declaration charges the

defendants with obstructing and turning a watercourse on the plaintiff's land, whereby certain damages were sustained by the plaintiff. By the referee's report, it appears that the real complaint of the plaintiff was, that the defendants having built their road over the old highway through his farm, upon the west side of which there had been for many years a ditch which served to carry away the surface water on the plaintiff's farm, west of the highway, and the defendants having substantially continued the same ditch for some years after making their road, finally allowed the ditch to become filled up with sand, so as to throw the accumulation of surface water, west of the railroad track, over the track upon the east side, and damage the plaintiff. Now, perhaps a ditch made to carry off the mere surface water produced by rains or the melting of snow, and not as a channel for a running stream, may not with the strictest propriety be called a watercourse, but in common parlance it is often so styled, and would perhaps as generally be understood to be meant by that term, as the natural channel of a stream, or an artificial channel into which a stream of water had been made to run.

At any rate, we think the court would have had ample power to make amendments that would have made the plaintiff's declaration cover all that was tried before the referee.

The defendants claim, too, that the facts reported show no liability upon them; that all that they have done must be taken to have been included in and covered by the award of the commissioners.

It must be admitted, under the award of the commissioners, that in their appraisal everything was considered and included which the plaintiff would suffer by the construction of the defendants' road in a prudent and reasonable manner, and all the damages that would be likely to accrue to him by the continuance of the road, managed and taken care of with reasonable care and prudence.

We apprehend that a railroad company may, as a question of prudence and care, as well be required to have regard to the prevention of damage to a land-owner by the accumulation of surface water merely as of a running stream, when the geographical formation and surrounding circumstances are such as to make it apparent to reasonable men that such precautions are necessary, and that, ordinarily, what would be a reasonable performance of their duty, under a given state of circumstances, would be a question of fact, and not a question

of law, for the court. The defendants seem to have thought that their duty or safety required a ditch to be kept open on the west side of their track, on the plaintiff's land, to carry off the large accumulation of surface water there, and they kept it open for some years, but finally allowed it to become filled up and the water to run over and damage the plaintiff.

The referee finds that this was not such prudence and care as the defendants were bound to exercise for the protection of the plaintiff, and if it was not, then we cannot say it was included by the commissioners in the award. From what is reported, we cannot say the referee was not well warranted in his conclusion, from the evidence and facts before him, and the judgment of the county court accepting his report is affirmed.

RAILROAD COMPANY'S LIABILITY FOR DAMAGES ARISING FROM CONSTRUCTION OF ROAD: See *Jones v. Western Vermont R. R. Co.*, 65 Am. Dec. 206, and collected cases in note thereto 210. As to the measure of damages allowed to land-owner for injuries to his land by construction of railroad over it, see *Johnson v. Atlantic etc. R. R. Co.*, 69 Id. 560.

AS TO RAILROAD COMPANY'S RIGHT TO OVERFLOW LAND IN CONSTRUCTION OF ITS ROAD, see *Johnson v. Atlantic etc. R. R. Co.*, 69 Am. Dec. 560.

THE PRINCIPAL CASE WAS CITED IN *Granite Co. v. Farrar*, 53 Vt. 587, to the point that a reference waives all objections to the form of the declaration.

HENRY v. VERMONT CENTRAL RAILROAD CO.

[80 VERMONT, 638.]

RAILWAY COMPANY IS NOT LIABLE FOR MAKING ERECTIONS IN RUNNING STREAMS, where they are guilty of no want of proper care and skill, unless they directly affect the riparian owners.

RAILWAY COMPANY IS LIABLE FOR MAKING ERECTIONS IN RUNNING STREAM, where the riparian owner above is injured by the rise or flowing back of water, occasioned by such erections below him. This is a direct injury, and the company must guard against it.

RAILWAY COMPANY IS NOT LIABLE FOR MAKING NECESSARY ERECTIONS IN RUNNING STREAM, though a riparian proprietor's land below has been gradually washed away by a change in the course of the current of the stream; and it makes no difference whether such erections have been made in a careless and unskillful manner or not. The injury is merely consequential, and one of those remote consequences which the law will not make the basis of an action.

CASE. Plaintiff owned a farm on the bank of Winooski river. The current of this stream ran away from his farm towards the other bank, until defendants, in constructing a railroad bridge across the river, erected two piers in the stream, thereby obstructing the natural and ancient channel, and turning the

current directly against the plaintiff's farm, the effect of which was to cut out and wash away a large quantity of land therefrom. The declaration was demurred to, because it did not show that the plaintiff had suffered any damage for which an action would lie, and was declared insufficient.

Peck and Colby, for the defendants.

By Court, REDFIELD, C. J. This is a demurrer to the plaintiff's declaration.

The case has not been argued on the part of the plaintiff, which leaves the court at great disadvantage, as it seems to be one of first impression.

The plaintiff's claim is that the course of the current of the river has been so changed, by the erection of one of the defendants' bridges, that it wears into the bank on his side, and thus, by attrition, wears off his soil, and gradually changes the course of the stream some distance below the bridge, to his detriment. In the first count this is charged, in general terms, as the result of the erection of defendants' works. There is no allegation that the erections are unnecessary for the defendants' use or convenience. And as it is necessary to treat the defendants as a person, and by consequence, as a corporation of the kind described, in order to maintain the action, we may fairly presume they do not make expensive erections except from necessity or convenience.

The law is well settled that a railway company is not liable for making erections in running streams, where they are guilty of no want of proper care and skill, unless they directly affect the riparian owners. If the water is caused to flow back so as to directly injure the soil, this has been regarded as one of the consequences which the company is bound to guard against or to compensate. This is not one of the effects of the ordinary use of the water, and it is a direct injury.

So, too, when the company's works are imperfectly or improperly made, in respect of matters against which they are bound to guard, for the security of riparian owners, they are ordinarily liable for consequent injury.

But the present is a case where the injury is in two of the counts, alleged to be the result of the careless and unskillful manner of making the erections, and if the damage complained of is of that class against which the company are bound to exercise either caution or skill, and have omitted their duty in that respect, they are liable.

But we think the damage complained of is not of that character that the defendants are bound to take it into account in making erections for the support of their bridge.

1. It is not a cause of injury whose operation can be calculated or limited in its extent and operation, or defined in any mode, and by consequence, not one which in the nature of things can be guarded against.

2. It is not a cause of damage which inevitably produces its effects, but only one which, in its operation, may require greater precautions against injury to be used by proprietors below. Hence the law rather chooses to leave each proprietor to guard his own shore than to require riparian owners above to forego any use of the water which they may deem beneficial to themselves. Thus mill-owners, or those who may use water from a running stream for purposes of irrigation, have never been required to restore the water to the stream at any particular points, or so as to leave the force and direction of the stream precisely the same as before. And if any such duty had existed, traces of it would undoubtedly be found in the books, and might have been brought to our notice.

3. The act complained of is merely consequentially injurious, producing no direct injury, like the flowing of land, even by means of an obstruction in a running stream. And the damage to riparian owners below, by means of the change in the current, is so remote and uncertain a consequence that the law has not, and we think cannot, hold the owner above liable for such consequences. It is one of those remote consequences of which the law takes no such account as to make it the basis of an action.

If we have failed to apprehend the true ground or the best ground of the plaintiff's claim, it will not be matter of surprise when it is considered that the action is one of new impression, and that no brief or argument has been submitted on the part of the plaintiff, and that our time will not allow us to make any extensive research during term, so that the decision is merely that of first impression from our general reading upon the subject.

Judgment affirmed.

RAILROAD COMPANY'S LIABILITY FOR DAMAGES ARISING FROM CONSTRUCTION OF ROAD: See *Jones v. Western Vt. R. R. Co.*, 65 Am. Dec. 206, and collected cases in note thereto 210.

RAILROAD COMPANY'S LIABILITY FOR SO CONSTRUCTING ITS ROAD ACROSS STREAM AS TO OVERFLOW LANDS ABOVE: See *Johnson v. Atlantic & St. L. R. Co.*, 60 Am. Dec. 560.

WALWORTH v. SEAVER.

[80 VERMONT, 723.]

SUFFICIENCY OF NOTICE UNDER LAW MERCHANT.—Notice deposited in the proper post-office, within the proper time, and with the proper direction, is *per se* notice to a party to a commercial instrument, whether it ever be received or not. The notice must go at the risk of the indorser. The postmaster in such a case becomes in effect the agent of the party to whom the notice is sent.

SUFFICIENCY OF NOTICE UNDER COMMON-LAW PRINCIPLES.—Notice deposited in the proper post-office, within the proper time, and with the proper direction, is only *prima facie* evidence of notice to the one to whom the notice is sent; and it may be shown that no notice was ever actually received. This is a question for the jury. The notice must go at the risk of the sender; and the postmaster, in effect, is his agent for the safe delivery of the notice.

ASSUMPSIT. An action was pending between plaintiff and defendant; and the latter agreed that if the former would discontinue the action he would deliver to him, by the first opportunity, a good set of wagon-wheels. Plaintiff did discontinue the action. Several months afterwards defendant sent the wheels to plaintiff, who was dissatisfied with them, and refused to use them. As soon as he discovered the defects in the wheels he wrote to defendant, where the latter resided, stating that the wheels were defective, and that he would not accept them on the contract. This letter he deposited in the proper post-office. Defendant denied that he had ever received this letter. The other facts are stated in the opinion.

J. Cooper, for the defendant.

J. H. Prentiss, for the plaintiff.

By Court, BENNETT, J. We apprehend that the grounds which the court below must have assumed in their charge, that the putting a letter in the proper post-office, with the proper direction, giving notice of the defective character of the wagon-wheels, and that they would not be accepted on the contract, was *per se* notice of its contents to the defendant, cannot be sustained.

The defendant's testimony went to show that no such letter was ever received by him, and still the court told the jury that notice sent by mail would be sufficient if sent in due time, and they do not put it to the jury to find whether the defendant in fact received the notice.

At the present day, by the commercial law, which has for its basis the usage of merchants, it is unquestionably true that a notice deposited in the proper post-office, within the proper

time, and with proper direction, is *per se* notice to a party to a commercial instrument, whether it be ever received or not. The notice must go at the risk of the indorser. If it was not so, the negotiating of bills payable at great distances would be greatly embarrassed, and in fact obstructed. The indorser of commercial paper may well be considered as assenting that this shall be notice to him of any default of the previous parties on the paper.

The parties to commercial paper must be considered as rendering themselves subject to commercial law and usage: *State Bank v. Ayers*, 7 N. J. L. 130, 131. By the commercial law, the postmaster in effect becomes the agent of the party to whom the notice is sent, and this results from the usage of merchants, and is founded upon such usage, and is necessary for the convenience and promotion of commercial transactions, and is applicable to a class of men only whose business requires them daily to resort to their post-office. But this is not a case within the law merchant, and this case must rest on common-law principles. It was the duty of the plaintiff to give the defendant notice of the defect in the wheels in proper time, and if for his own convenience he sent the notice by mail, he made that his own channel of communication, and the postmaster is to be regarded as his agent, and not as the agent of the defendant, and the conveyance of the letter must be considered as at the risk of the plaintiff. *Prima facie* it should, no doubt, be taken that the defendant had notice, but the evidence is not conclusive and may be rebutted, and whether it was rebutted in this particular case was a question for the jury to pass upon.

We see no sufficient reason why the transmission of the notice in this case should be at the risk of the defendant rather than the plaintiff. No assent of the defendant that this should be *per se* notice to him can be presumed, unless it is a case to be governed by the usage of merchants, which it is clearly not. In regard to commercial paper, where the indorser and the party who is to give the notice reside in the same town, the general rule certainly is, that the notice must be given personally to the indorser, or left at his domicile or place of business, and that notice through the post-office is not *per se* sufficient: See *Pierce v. Pendar*, 5 Met. 352, and the cases there cited. In such a case, the convenience of commercial transactions does not especially require the law to be that putting a letter into the post-office is *per se* sufficient.

Judgment reversed, and cause remanded.

NOTICE BY MAIL, SUFFICIENCY OF, AS PERTAINING TO DISHONOR OF COMMERCIAL INSTRUMENTS: See *Vigers v. Carlon*, 33 Am. Dec. 575; *Mead v. Carnal*, 39 Id. 552; *Downs v. Planters' Bank*, 40 Id. 92; *Hawelton Coal Co. v. Ryerson*, Id. 217; *New Orleans O. & B. Co. v. Briggs*, 43 Id. 224, and collected cases in the notes thereto. This subject is discussed at length in the note to *Ransom v. Mack*, 38 Id. 607-616. The holder of a bill who has placed notice of protest in the post-office in due time is not responsible for any defects, in the regulation of the mails, or for the time which may elapse between the deposit of the notice and its delivery: *Ellis's Adm'r v. Commercial Bank of Natchez*, 40 Id. 63.

BLODGETT v. BICKFORD AND TATE.

[30 VERMONT, 781.]

SURRENDER OF NOTE BY MISTAKE—MAKER'S LIABILITY.—The maker of a note who surrenders it to be canceled before maturity is restored to his original liability on the note, if, before maturity, the consideration on which the note was surrendered fails, or the source fails from which the parties contemplated the note would be paid.

SURRENDER OF NOTE BY MISTAKE—SURETY'S LIABILITY.—The surety of a note surrendered by mistake to be canceled before maturity is still liable to the payee, where the latter, before maturity, notifies the surety of the mistake, and that he still looks to him for payment; provided the surety has not, prior to such notice, and relying upon the surrender of the note, relinquished securities held by him to protect his liability upon the note. It seems, too, that where the legal relations between the surety and principal have not been changed or prejudiced, the payee may, under such circumstances, enforce the note, when due, against the surety, without notice of the mistake.

ASSUMPSIT. The defendant Bickford was absent from the state, and made no defense. The question was confined to Tate's liability. The other facts are stated in the opinion. Judgment for defendant Tate.

T. P. Redfield, for the plaintiff.

J. Cooper, for the defendant Tate.

By Court, **PIERPOINT, J.** In this case the plaintiff claims to recover the amount due on a promissory note given by the defendants to him, dated January 26, 1855, for the sum of one hundred and fifty dollars, payable in one year from date. The plaintiff loaned the money for which the note was given to the defendant Bickford, to enable him to prosecute a claim for a patent for a machine which he supposed he had invented, and the defendant Tate signed the note with Bickford as his surety. At the same time Bickford agreed with the plaintiff to let him have the right, to be secured by said patent, to two thirds of

the territory of the state of Vermont, and out of the avails of the sale of the right for this territory this note was to be paid. On the strength of this agreement, the plaintiff afterwards contracted to sell the right to one county for a note for seventy-five dollars, and to another county for one hundred dollars. For this last contract no note was given. After these contracts were made, the defendant Bickford called on the plaintiff to surrender the note for one hundred and fifty dollars, as he had sold more than enough territory to pay it. The plaintiff gave up the note, and it was canceled, with the knowledge of Tate.

Bickford failed to obtain a patent for his invention, and the note for seventy-five dollars was given up by the plaintiff, and his other contract of sale of territory for one hundred dollars became inoperative. These facts transpired in the spring of 1855. In August or September, 1855, the defendant Bickford left this state, and has not returned. Soon after his departure, and some months before the note in suit became payable, the plaintiff gave the defendant Tate notice that he should claim to hold him liable on the note. The court below decided that it was the duty of the plaintiff to give the defendant Tate notice within a reasonable time after ascertaining that the sources from which said note was to be paid had failed; that he had not done so, and therefore could not recover of Tate.

It is not contended in this case that the debt due from the defendants to the plaintiff has been paid or in any manner satisfied. The facts detailed in the bill of exceptions cannot have any such effect. At the time the note was surrendered both parties no doubt honestly supposed that the patent would be granted, and that the plaintiff had in his hands, by reason of the said contracts, the means from which his note would be paid, but when Bickford failed to obtain a patent, the plaintiff's contracts for the sale of it of course fell to the ground, and not only the entire consideration on which the note was surrendered failed, but also the source from which the parties in the outset contemplated that the note would finally be paid. The happening of these events left the parties in the same position as to their legal rights and liabilities as though no contract for the transfer of a part of the right for this state had been made between them. It cannot be contended that the surrender of the note under these circumstances operated to discharge the obligation existing between these parties; but it is contended that inasmuch as Tate, who was surety for Bickford, knew that the note was surrendered and had reason

to suppose that he was discharged, therefore, when the events transpired which showed that he was not discharged, it was the duty of the plaintiff to give him notice thereof within a reasonable time. This position, we think, is not sound. What has transpired to change the legal relations between the parties? The surrender of the note cannot have that effect any more in this case than though it had been given up in consequence of any other mistake that the parties may have made in relation to it. The note was given up, not because it had been paid, but because the parties supposed it would be paid from means in the plaintiff's hands. When these expectations failed, it left the original liability in full force; indeed, the obligation on the defendants was the same as at first, and the same as it would have been if the note had not been surrendered. If all the facts in the case had existed, except that the note had not been given up, but all parties had fully expected that it would be paid from the sources in the plaintiff's hands, it would hardly have been claimed that on the failure of those sources the plaintiff was bound to give notice of such failure before the note became due or lose his debt. The fact that the defendant Tate was a surety for Bickford we think can make no difference in this case. As between the defendants and the plaintiff, both the defendants were principals, and he had the right to treat them as such, and if notice that he intended to rely on that note, which he had given up, was necessary to prevent his losing his claim, it was just as necessary to give such notice to Bickford as Tate.

The only duty that the law imposed on the plaintiff by reason of his knowledge that Tate was surety for Bickford was so to deal with Bickford as not to prejudice the legal rights of Tate as between him and Bickford. If, then, the surrender of the note under the circumstances existing in this case did not discharge the defendants from their liability to pay the same when it fell due, we know of no rule of law that imposes upon the plaintiff the performance of any act not contemplated by the original contract, in order to enable him to retain his right to demand the money when the note became due, and to enforce it if it was not then paid.

If the defendant Tate had security from Bickford to indemnify him against liability in consequence of signing said note, which he had surrendered on the giving up of the note, or if the note had become due, so that he could have paid it and then secured himself therefor against Bickford, or had been deprived of any legal right existing between himself and Bick-

ford, in consequence of the surrender of the note, or the plaintiff's neglect to give him notice so as to change the legal and equitable relations existing between them, the case might then merit a different consideration. But in the absence of all such facts in the case, we think that the plaintiff is not deprived of his right to recover in consequence of his not having given notice at an earlier day of the failure of the sources of payment on which the parties relied.

Judgment reversed, and the cause remanded.

HARRIS v. STEVENS.

[31 VERMONT, 79.]

RAILROAD STATION-HOUSE IS OPEN TO TRAVELING PUBLIC, and any person desiring to go upon the cars has the right to go into such house at the proper time, and remain there until the departure of the train, whether he has purchased a ticket or not.

RIGHT TO ENTER AND REMAIN AT RAILROAD STATION-HOUSE MAY BE FORFEITED by improper conduct of the person, or by his violation of the rules of the company, and then the company by its servants may remove him.

RIGHT TO ENTER AND REMAIN AT RAILROAD STATION-HOUSE extends only so far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars, and as to what is a reasonable time will depend upon the circumstances of each particular case.

RAILROAD COMPANIES HAVE NOT ONLY RIGHT TO ACT AS COMMON CARRIERS, but are bound to act as such.

RAILROAD COMPANY MAY REMOVE FROM STATION-HOUSE ONE not intending to travel upon their road, if after request he refuses to depart.

RIGHT TO REMAIN AT RAILROAD STATION-HOUSE DEPENDS ON INTENT of the party to take a train expected soon to leave, and, upon being requested to depart, should make known his intent to the person so requesting him.

REPLICATION IN TRESPASS FOR REMOVAL FROM RAILROAD STATION-HOUSE should show that plaintiff was there intending to go upon a train that was expected to leave soon, but need not allege that plaintiff went to the station-house for the purpose of traveling on the cars. It is sufficient if such intent was formed after the entry and before the assault.

TRESPASS for assault and battery. The facts are sufficiently stated in the opinion.

E. R. Hard and J. French, for the plaintiff.

George F. Edmunds, for the defendants.

By Court, **PIERPOINT, J.** The questions involved in this case arise upon a special demurrer to the plaintiff's replication.

It is insisted on the part of the defendants, among other things specially set forth as cause of demurrer, that the facts alleged in the replication are not sufficient to justify the plaintiff in remaining on the premises of the railroad company after he was requested by the defendant Parmalee (who was the station-agent) to depart therefrom, inasmuch as it is not alleged that the plaintiff was there intending to take the then next train of cars, upon which he was entitled, by his ticket, to go to Williston, and that the said next train was then about to leave for Williston, and that the plaintiff was then upon the premises of the company awaiting and expecting the arrival and departure of such train.

On the part of the plaintiff, it is insisted that the replication is sufficient; that the plaintiff had the right to enter upon the said premises of the corporation, and to remain after he was requested by the agents of the company to depart, and that this right existed independent of his having purchased a ticket, or of any intention to take the cars.

This raises the question as to the relative rights, powers, and duties of the corporation and the public, or the individual members of the public, in and over the railroad, the station-houses, and the necessary surrounding territory and buildings.

It is conceded by the plaintiff that the corporation must from necessity have the right "to make such rules and regulations concerning the management and control of its property as may be necessary to protect its servants and the public in the safe and convenient use of the road, but beyond this it is claimed the rights of the public in the property taken for its use by the corporation are paramount to those of the corporation." If by this it is meant that the corporation have the sole and entire possession and control of their road and premises, for all purposes contemplated by the act of incorporation, and for which they were authorized to take the property, the correctness of the claim may be conceded, as that is yielding to the corporation all the power and authority that the legislature have taken from the original owners of the land.

But when it is claimed that the corporation have only a right to make rules and regulations concerning the property, and only a limited and qualified possession, and that the public or individuals have a right to enter upon and occupy or in any manner use the premises of the road for other purposes than that contemplated by the charter of the company, we think such claim cannot be sustained.

No person, other than those from whom the property was taken, either as a member or agent of the company, or as one of the public, has any authority, control, or right in or over the premises of the company, except such as is derived directly or indirectly from the act of incorporation.

That vests the title to the land, taken in pursuance of the charter, in the corporation for the purposes specified. This gives them the right to the sole and exclusive control of it for the purposes and uses specified in and implied by the charter, and neither the corporation nor the public have the right to use it for any other purpose, or in any other manner.

This exclusive possession and control of the premises would seem to be indispensable to the full exercise and enjoyment of their rights, and a proper discharge of their duties to the public. And this possession of the corporation is not at variance with any rights which the public have in regard to it; indeed, the only right the public have is to demand that the corporation shall faithfully discharge the duties towards the public that their charter imposes.

But it is said that railroads are public highways, and that the public have the same right to enter upon them and remain as upon any other highway, provided the servants of the company are not interfered with, or interrupted in the discharge of their duties, and no rules or regulations of the company are violated.

In the case of *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt. 590, cited by the plaintiff, a railroad is spoken of as an improved highway. It is a place of public travel; but while it may be said to be improved in its means of travel, the rights and duties of the public, it must be admitted, are greatly changed, so that while for some purposes, and to illustrate certain principles that are common to both, it would be proper to speak of railroads as highways, yet for other purposes, and to elucidate other principles, nothing could be more erroneous than to regard the two as standing on the same footing; the rights of the public that are common to the two are quite limited; on the one, they have the right to go when and as they please; on the other, they have the right to be carried when and as the company please, due regard being had to the requirements of their charter, and the express or implied terms of the contract entered into between them and the company.

If, then, the corporation, under whom the defendants justify, are to be regarded as in the exclusive possession of the premises,

neither they nor the plaintiff have any rights or privileges therein, except such as are derived from the charter, or grow out of that which had been done by the one or the other party in view of it, and with reference to the rights and duties created by it.

The question then arises, What rights did the plaintiff acquire by purchasing a ticket entitling him to go upon the train to Williston? and did he so conduct himself in view of these rights as to be able to set them up in avoidance of the justification pleaded by the defendants?

The railroad company were under a legal obligation to permit any persons to get upon their cars, and to transport them to any place they desired to go to upon the line of their road, where the train was accustomed to stop, upon the payment of the usual compensation therefor, and a compliance with all reasonable and proper rules and regulations established by the company for the safety and convenience of the public and the proper government and management of their road. Such being the obligation of the company, any person who desires to go upon the cars has the right, in a proper manner and at a suitable time, to go upon the premises of the company at any station where the passenger trains stop to receive passengers for the purpose of procuring a ticket and getting on board, and the company has no right to prevent or hinder his coming on their premises, or to order him to depart therefrom before the departure of the train for the place to which such person intends to go; and such person has the right to remain on the premises of the company, at such station, until the departure of the train, and then to go upon it, and this, too, whether he has purchased a ticket or not. The right to remain until the arrival of the train, and then to go upon it, does not depend upon the purchase of a ticket, unless the rules of the company require that all persons shall purchase tickets before they enter the cars. The procuring of a ticket only furnishes evidence of an intent to go upon the train.

This right to enter and remain upon the premises of the company for such purposes may be forfeited by the improper conduct of the person or the violation of the rules and regulations of the company, and if he does so forfeit his right to remain, the company, by their servants, may require him to depart, and on his refusal so to do, they may remove him.

Again: the right must not only be exercised in a proper manner and with a due regard to the just requirements of the

company, but it must be exercised within a reasonable time; that is, the person may come upon the premises of the company within a reasonable time next prior to the regular time of departure of the train on which he intends to go, and remain until such train leaves. This right to enter and remain exists only by virtue of and as an incident to the right to go upon the train, and it is to be extended so far only as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars. And what is a reasonable time must depend much upon the circumstances of each particular case, as it would be impossible to fix upon any definite period that should govern all cases; what would be reasonable in one case might not be so in another.

The situation of the station with reference to public houses, the distance that the intended traveler resides from the station, and many other considerations should all be taken into the account in determining the length of time that it would be reasonable for the person to come to the station and remain before the leaving of the train on which he intended to take passage.

When the company commence running their trains, erect and open their station-houses as the places where their trains stop to receive and discharge passengers, and hold themselves out to the world as common carriers of passengers, they then acquire all the rights and privileges, and become liable to all the duties and responsibilities, as between themselves and the public, that appertain to that relation at common law; and by thus doing, they give an implied license *prima facie* to all persons to enter their premises, and no person is a trespasser by merely entering therein. But at common law such license is revocable, and when revoked, such right to enter or remain is terminated: *Commonwealth v. Power*, 7 Met. 596 [41 Am. Dec. 465].

Under ordinary circumstances, the common carrier assumes the position voluntarily, and may throw off the character and its responsibilities at any time he sees fit, as to all transactions the performance of which he has not entered upon. He owes no duties and is under no responsibilities to the public, except such as grow out of and belong to his character as common carrier.

But we apprehend it is not so with railroad corporations; they are not like mere private corporations or individuals, but are to a great extent public in their character; they are created for the sole purpose of erecting, putting in operation, and

carrying on a public work, and are authorized to take private property for that purpose and for that reason. The great object for which they are created and invested with their extraordinary powers is that they shall act as carriers of persons and property upon their roads, when completed, and by accepting their charters, constructing and putting in operation their roads, they not only take upon themselves all the duties and liabilities incident to the character of common carriers, but they assume other important duties and liabilities. The public have granted them charters for specified purposes, and by accepting them, they have obligated themselves to carry out those purposes. They not only have the right to act as common carriers, but they are bound to act as such. The public have the right to insist that they shall continue so to act. They cannot throw off this responsibility, and absolutely refuse to discharge their duties, except by an abandonment and surrender of their charters; they cannot, of their own motion, while acting under their charters and operating their road, divest themselves of their character of common carriers, and refuse to receive and carry passengers upon their roads, or refuse to allow them to come upon their premises at the proper place and time, for the purpose of taking passage.

The public, for such purpose, have the right to enter upon the premises of the corporation by virtue of a higher right than the mere implied revocable license of the corporation as carriers at common law. It is a part of the contract by which they hold their charters, that the public are to have the right to enter upon the premises acquired under their charters for the purpose of being carried on their roads, and this is a right which the corporation cannot revoke, or refuse to permit the exercise of. They can regulate its exercise by such rules as are necessary to secure the full and perfect enjoyment of it on the part of the public, and prevent its infringing on the rights of the corporation. But as has been before remarked, the right to enter, in the case of an intended passenger, depends upon the intent to go upon the train as a passenger, and the time when the entry is made for such purpose. The right to enter and remain upon the premises of a railroad corporation is not common to all; it must depend upon the object and business of the person who enters.

As has been said, the corporations, by erecting their station-houses and opening them to the public, impliedly license all to enter. Still, such license is revocable as to all, except those who have legitimate business there growing out of the road, or with the officers or employees of the company. As to persons hav-

ing no business at the stations, the corporation, by its officers and agents, have the right to direct them to depart, and on their refusal so to do, they may be removed by such agents. The existence of this right in the corporation would seem to be indispensable to the comfort of passengers in getting to and from the cars, and in transacting that business with the agents of the company which is necessarily done at the stations, and also to the protection of the property intrusted to its care, for the safety of which it is held to the strictest accountability.

The public interest not only requires the existence of this right in the corporations, but its judicious exercise. Without it the stations on the lines of our several roads, in many instances, would become the places where the idle and vicious would resort to pass away their time, and indulge in practices and pursuits that are always alluring to the young and inexperienced, but which too often lead to a life of infamy. In short, let it be understood that any person has the right to resort to railroad stations at all times, and to remain as long as he pleases, by virtue of the undivided portion of the right of eminent domain that is supposed to exist in his person as a member of the great public, and many of our stations would become public nuisances to which it would be neither comfortable nor safe for travelers to resort.

The principle then being established, that a person intending to take passage on the cars has the right to go upon the premises of the corporation where he intends to get on board the cars, within a reasonable time before the expected departure of the train on which he intends to go, and to remain there until the departure of such train, but has not the right to enter and remain upon such premises after having been requested to leave by the corporation, unless he is then intending so to go upon the train, and that the corporation has the right to remove him if after request he refuses to depart, it would seem to be but reasonable and just, inasmuch as the right to remain after request to leave is made to depend entirely upon the intent of the party to take the train, to require of him that, on such request being made, if he intends to rely on such right, he should make known his intent to the persons making the request, or show that such persons had knowledge thereof from some other source. This doctrine is fully recognized in the case of *Commonwealth v. Power*, 7 Met. 596 [41 Am. Dec. 465]; see also *Redfield on Railways*, 27, 28.

The question then arises, Has the plaintiff in his replication

to the defendants' plea set forth, with that degree of certainty required by the rules of pleading, such facts as are sufficient to justify him in attempting to remain upon the premises of the corporation after a request by their agents to depart?

The plaintiff alleges that he entered upon the premises of the corporation at their station in Essex, and purchased a ticket to the station in Williston.

It is insisted by the defendants that the replication is insufficient, in that it does not allege that the plaintiff entered upon the premises, intending to go to Williston, or to purchase a ticket.

We think it was not necessary to allege that fact, for if he entered without that intent, still, if after his entry he formed the intent, his right to remain thereafter would be the same as though it had existed at the time of entry.

The plaintiff also alleges that while he was so upon said premises, and after the purchase of said ticket, and while he was waiting for the departure of the cars upon which he intended, and by virtue of his ticket had a right to go, and before the departure of the train, the defendants, "well knowing that such contract had been made, and that the said plaintiff so held the said ticket, as aforesaid, unlawfully," etc.

The replication contains no allegation as to the time when the train was, or was expected, to leave the station, with reference to the time when the plaintiff entered, or when he was ordered to depart, and the acts complained of were committed. The allegations are consistent with the fact that the train on which the plaintiff's ticket entitled him to go, and on which he intended to go, and for the departure of which he was waiting, was not to leave, or expected to leave, for twenty-four hours, or even forty-eight hours thereafter, and still the ticket may have been for the next regular train between the two stations. But it is not alleged that it was the intent of the plaintiff to go upon the then next regular train, or that his ticket was for such train. For aught that is alleged, his ticket may have been for, and his intent to go upon, one of those trains called excursion trains that are advertised to run at some particular time, and for which tickets are sold many days in advance of the time of departure. In this respect, we think the replication is defective; the plaintiff should have alleged that at the time when, etc., he was at the station awaiting the departure of a train that was expected soon to leave, and on which he intended to go. The replication should show that the plaintiff was there intending

to go upon a train that was expected to leave within such a short period of time thereafter, that, in view of the rule as before laid down, he would have the right to remain at the station until its departure. This replication, we think, does not show such a state of facts as are necessary to vest such right in the plaintiff, and therefore it is insufficient.

The judgment of the county court is affirmed.

COMMON CARRIER IS BOUND TO RECEIVE PASSENGERS AND GOODS, if he have room, and transport them for a reasonable compensation: *Cole v. Goodwin*, 32 Am. Dec. 470; *Doty v. Strong*, 40 Id. 773; note to *Sandford v. Catawissa etc. R. R. Co.*, 64 Id. 671; *Galena etc. R. R. Co. v. Rae*, 68 Id. 574, and note 577. And this rule applies to railroad companies, because they are common carriers: *Chevallier v. Strahan*, 47 Id. 651.

EXPULSION OF PASSENGER BY COMMON CARRIER, POWER OF, WHEN, WHERE, AND HOW MAY BE EXERCISED: See note to *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 570, discussing this subject.

KEITH v. GOODWIN.

[31 VERMONT, 203.]

NOTE DISCOUNTED BY CASHIER OF BANK WHERE IT IS MADE PAYABLE, and indorsed by him in the name of the bank, is a sufficient adoption of the note by the bank to render it binding on all parties to the contract.

NAMING BANK AS PAYEE OF NOTE IS MERELY FORMAL, and not a substantial part of the contract, where the note is executed for the purpose of raising money.

PRINCIPAL MAY PROCURE ADDITIONAL SURETIES AS JOINT MAKERS OR GUARANTORS, indefinitely, until the note is fairly launched in the market as a security, if it have two distinct parties, without affecting the obligation of the first signers.

GUARANTOR OF NOTE ALREADY SIGNED BY SURETIES is *prima facie* surety for them, and not surety with them.

GUARANTOR OF NOTE SIGNED BY SURETIES, but appearing as principals, is, when obliged to pay the note, entitled to recover the full amount from the sureties, unless it be shown that the guarantor signed as a general surety, intending to be liable to contribution with them.

ASSUMPSIT upon a promissory note. The facts are stated in the opinion.

Peck and Colby, for the plaintiff.

Heaton and Reed, and O. H. Smith, for the defendant.

By Court, REDFIELD, C. J. The note in question was executed by the members of a partnership or joint-stock company, and by this defendant as surety for them, by their procure-

ment. One of the principals then procured the plaintiff and others to guarantee the payment of the note. The fact that the defendant was surety did not appear upon the face of the note, nor was it known to the plaintiff at the time he made the guaranty. The note was made payable to the Vermont Bank, and was procured to be executed and the guaranty to be made for the purpose of raising money upon it at that bank, it would seem. John A. Page, the cashier of that bank, on his own account discounted the note while it was still current, and subsequently, but before it became due, sold and indorsed it, in the name of the bank, to one Hubbard, who after it fell due called upon the plaintiff for payment, and he paid it, taking Hubbard's indorsement upon the note.

The plaintiff now seeks to recover the whole amount of the note of the defendant, as a joint maker or principal in the note, and if not in that capacity, then as co-surety, to recover of him his proportion of the amount paid. The defendant had no knowledge that any one was expected to guarantee, or that any one did guarantee, the payment of the note, or that the note was put in circulation, or if so, that it had not been paid, until called upon by the plaintiff to pay it.

1. It is objected that the note was never discounted in the manner contemplated at the time of its execution, and that therefore the defendant never became liable upon the note.

We think the fact that this note was discounted by the cashier of the bank where it was made payable, and by him indorsed as the cashier, in the name of the bank, must be regarded as a sufficient recognition or adoption of the note by the bank, to render it binding upon all the parties to the contract, within the decisions in this state. This very point is, in effect, decided in *Bank of Burlington v. Beach*, 1 Aik. 62. The doctrine of this case has been repeatedly recognized in this court, and never questioned. The same rule prevails in the state of New York: *Bank of Chenango v. Hyde*, 4 Cow. 567; *Bank of Rutland v. Buck*, 5 Wend. 66. This last case is where the note was procured, and made payable to the Bank of Rutland, for the purpose of raising money to pay upon execution. The bank refusing to make the discount, the note was received substantially in payment upon the execution, and by consent of the bank was sued in their name for the benefit of the officer. And precisely the same point was decided by this court, not many years since, in the county of Orleans. We cannot think, therefore, that the present case can be regarded

as carrying the rule beyond where it has already been carried. And there is nothing in the principle of these decisions which does not commend itself to our sense of justice and propriety.

We are aware that a different rule, to some extent, prevails in the states of Massachusetts, Maine, and Ohio, as the cases referred to in the argument show. But we think the rule adopted in this state, *Bank of Burlington v. Beach*, 1 Aik. 62, and which has been so long acted upon here, far better calculated to subserve the ends of justice and fair dealing than that which denies the recovery upon that ground.

When a note is executed for the purpose of raising money in the market, although made payable to a particular bank or firm, it is well understood that this is generally regarded by business men as rather a formal than a substantial part of the note. If the note were made payable at a particular bank, to the order of the makers, it would be much the same thing. So, too, if made payable to bearer generally. The name of the person to whom the note is payable is mere form. It is understood that it is going into the market as money, and in exchange for money, to any party who will make the discount. If negotiated at the bank, it may pass into other hands the next hour. And there is no claim that this will have any tendency to release the sureties. We think there is no difficulty with the case upon this point.

2. In regard to the right of the plaintiff, as against the defendant, upon the note, we think the law is settled beyond all question that he is, at all events, to be treated as a co-surety with the defendant, if not also as a surety for the defendant as a joint maker and principal in the note. so far as he is concerned.

As to the objection founded upon the case of *Gardner v. Walsh*, 32 Eng. L. & Eq. 162, that the guaranty was such an alteration of the note, being done without the consent of the defendant, as will avoid the note, we cannot regard this as coming fairly within the principle of that case. That case is not parallel with the present.

There the decision goes upon the ground that after a note becomes effectual as a contract by delivery, it is not competent for the holder, without the consent of the makers, to procure an additional signer; that this is a material alteration, and avoids the contract, whether it operates favorably or unfavorably to the other signers. Whether the decision to this extent is sound or not (and we do not intend to question that case), we think the rule thus laid down could have no application to

a case like the present. Here the note was signed by the defendant as a joint principal, and intrusted to his associates, and if he had signed as surety upon the face of the note, and intrusted it to his principals, the rule would have been the same. He thereby gives those to whom he intrusts the note an implied authority to obtain either additional sureties, as joint makers, or guarantors, indefinitely, until the note is fairly launched in the market as a security, having two distinct parties. Before that it is merely inchoate, and it is clear that the procuring of additional signers, guarantors, or indorsers comes fairly within the implication of authority given the party to whom the defendant's signature is intrusted, and which at that time, so far as additional signers are concerned, is to be regarded as merely blank, or, in one sense, as an authority to use the credit of the party, either alone or with others, in the form in which he has signed. But the idea that no other indorsement or guaranty is to be procured, and that if the note will not go in that form it is not to be used unless all the parties consent to the introduction of other parties, is certainly contrary to the understanding of commercial men, which is the law of such cases, and the only just basis of the implied contract resulting from the facts.

It being now well settled, by the case of *Deering v. Earl of Winchelsea*, 2 Bos. & Pul. 270, that a surety, although signing another instrument guaranteeing the same debt, must be regarded as a co-surety with all the sureties to the original contract, there would seem to be no question of the right of the plaintiff to claim a remedy to that extent against the defendant, even if he had at the time of making the guaranty known the defendant to have been a mere surety. This point was decided by this court in *Flint v. Day*, 9 Vt. 345; see also *Norton v. Coons*, 3 Denio, 130; *Barry v. Ransom*, 12 N. Y. 462; *Tobias v. Rogers*, 13 Id. 59; *Craythorne v. Swinburne*, 14 Ves 160; *Deering v. Earl of Winchelsea*, 1 White & Tudor's Lead Cas. Eq. 100, and notes, English and American, where the subject is elaborately examined, and the cases fully presented and accurately digested.

3. But it seems to a majority of the court that the plaintiff is equitably entitled to treat the defendant as he held himself out upon the contract, i. e., as principal. There was nothing to intimate that the signers were anything but joint principals. And the defendant having so signed the note, and intrusted it to the others with authority to obtain additional signers or guarantors, it was giving them authority to represent the de-

defendant as a co-principal; and by presenting the note merely, and asking a guaranty of the plaintiff, a virtual representation was made that the defendant stood as joint principal. The case may well be supposed of the defendant being the only responsible signer, and the guaranty being made wholly upon his credit. If he could afterwards be allowed to falsify this representation thus held out upon the face of the paper, it might certainly work great injustice to the guarantor.

But this is a question depending mainly upon authority, we are aware, and should be decided upon the settled principles deducible from the adjudged cases.

It is admitted by all the writers upon this subject, and in all the cases where the question has arisen, and by all the judges, without exception, who have had occasion to speak of the point incidentally, that any one who is not in fact a joint or sole principal in a contract, but who binds himself for its fulfillment as a surety merely, may so stipulate at the time of entering into the obligation, as not to be liable to contribution with the other sureties who have signed before him. And the form of doing this is not important. Nor is it important that this should appear upon the contract. And where one signs as surety, after other sureties have signed, and without privity with them, it is not important that they should be made aware of the terms upon which subsequent sureties become holden. If the subsequent sureties become bound for the performance of the very same thing as the former ones, and especially by the same contract, the right of contribution is created in favor of the former sureties, unless there is some stipulation to the contrary. It is upon this ground that the action for contribution was maintained in *Flint v. Day*, 9 Vt. 345, against Mr. Day, who stood much in the relation of the plaintiff here, the note being paid by the prior sureties, and the suit brought to compel contribution of the last surety signing, but who signed on the back of the note in blank; and the court held that he thereby became a joint maker and liable to contribution with the other sureties. But even that case, upon its facts, is more doubtful than it was then regarded by the court. The later cases do not fully support it.

But where there is anything in the form of the contract or the nature of the transaction to show that the subsequent sureties did not expect to be holden as co-sureties with the others, but to stand merely as sureties for all the former signers, they are entitled to full indemnity from each of the others, or all jointly. As if the surety sign expressly as surety for all the

above signers, or when he signs, saying he is willing to be responsible for all of them. In such case he is not liable to contribution: 1 Story's Eq. Jur., sec. 498; Chit. Con. 598; Lead. Cas. Eq. 68, and notes; *Pendlebury v. Walker*, 4 You. & Coll. 424; *Moore v. Isley*, 2 Dev. & B. Eq. 372.

This very point is expressly decided in *Craythorne v. Swinburne*, 14 Ves. 160.

The facts of this last case seem to us very analogous to those of the present case, so far as the liability of the plaintiff to share the burden of paying this note with the defendant is concerned.

In that case, as well as this, the undertaking of the last surety was without the knowledge, expectation, or privity of the former ones; it was done, too, in both cases, to induce the advance of money upon the first contract, and because it could not be obtained without such additional indemnity or guaranty. And in the case of *Craythorne v. Swinburne*, *supra*, it was clearly held that there was no duty of contribution among the two classes of sureties. It is held that in the case of *Craythorne v. Swinburne*, *supra*, the indemnity was by a separate instrument, and here it is upon the same paper, but by a distinct contract, referring to the other for brevity, as written above. We cannot suppose it could have made any difference in the present case if the plaintiff had given his guaranty upon a separate piece of paper, writing the note or describing it. instead of referring to it as written above.

In the case of *Craythorne v. Swinburne*, *supra*, the question was determined upon the circumstances and oral evidence in the case as matter of fact, and made dependent upon the intention of the last surety. The same question might here very properly have been submitted to the jury, if there really is any conflict in the evidence, or if there should be hereafter, it might be proper to have the finding of the jury upon this point. But so far as the testimony is developed in the bill of exceptions, it seems to be all in one direction.

1. The form of the plaintiff's guaranty shows that he merely undertook for the solvency of all the primary signers of the note.

2. The manner of executing the note, the purpose of obtaining the guaranty as well as the form of it, all look in the same direction. And unless the defendant can satisfy the jury that, at the time the plaintiff signed the guaranty, he really expected to stand merely as a general surety, we think he is bound to indemnify him, as much so as if he had signed at his request,

and upon his express assurance that he would see him harmless. As matter of fact, or implication from facts, we cannot but regard the consideration that the plaintiff's contract was in the form of a guaranty as of some significance. The word "guaranty" in strictness may not import more than a promise or undertaking. But in commercial circles, and among business men generally, the term is understood in a more specific sense. A guarantor is not a maker or indorser, but one who is understood to assume more the obligation of an indorser than of a maker. Both the indorser and guarantor are understood to undertake for the maker, and as an aid to his undertaking. And originally the guaranty was understood to be operative only upon condition of the failure of the maker to perform the contract. And that is the present import of all guaranties which are conditional or dependent upon some prior act to be performed by some other party, as that the note or contract is collectible, *i. e.*, may be enforced by due process of law. And even absolute guaranties, like the present, are understood differently, and therefore entitled to a different construction from an absolute promise to pay a note.

If that had been the purpose of the plaintiff, and those who signed with him in this case, they would have merely underwritten the other signers of this note. The very fact that they made a separate contract, and that in the form of a guaranty, shows very fully that they did not intend a mere joint undertaking with the makers. We think the only fair construction of the plaintiff's undertaking, as between himself and the makers of the note, is, that he bound himself to whomsoever should be the holder of the note, that the signers were responsible, and would pay the amount at maturity. And although, as between himself and the holder, this bound him absolutely to the payment of the note, if not paid by the makers, without notice of the default on the part of the makers, that being a fact of which he was bound to take notice, yet, as between him and them, his undertaking was for them jointly, and not jointly with them.

Judgment reversed and case remanded.

CITATIONS OF PRINCIPAL CASE.—In *Bank of Montpelier v. Joyner*, 23 Vt. 484, the principal case was referred to as being similar in substance to the case first mentioned. In the principal case the bank refused to discount, and the money was advanced by a third person. In the case first mentioned the note was received by the bank as security instead of payment upon the debt, to which its avails, if discounted, were to apply. But if the note had

been taken to some third person and the money obtained upon it, it would, it was said, have been exactly like the principal case. In *Bank of Middlebury v. Bingham*, 33 Vt. 633, the court said: "It may now be regarded as conclusively settled in this state that a note made for the purpose of raising money, and made payable to a particular person or corporation, and with the expectation that the same will be discounted by the payee, may be taken and discounted by another, and that the person thus advancing the consideration may hold such note as a valid security for the money, even against sureties, and may enforce payment by suit in the name of the payee, unless such payee refuses to allow his name to be used for that purpose. It is not regarded as a material thing, even as to the sureties, who advance the money, or holds the note, as the benefit derived by the receipt of the money, and the obligation incurred for its payment, are precisely the same in the one case as in the other. It is unlike many other contracts, where the personal character and qualities of the contracting parties form a material element in the contract itself, because they may affect its performance or fulfillment. The mere promise to pay money is the same thing to one man as to another, and even if regard might be had to the character of the person to whom a note is executed, it could be wholly frustrated by a transfer to another, which could always be done so as to give to another the absolute control of the debt, even if not negotiable." To this the principal case, with others, was cited. The principal case was also cited to the same points in *Farmers' and Mechanics' Bank v. Humphrey*, 36 Vt. 557. In *Adams v. Flanagan*, Id. 407, the principal case was cited to the point that persons may assume a liability in such a form as to preclude all pretense of their being co-sureties; and that instead of signing a note with the principal or sureties, they may execute a separate instrument, and thus conclusively evidence their intent by a separate bond or guaranty. In the same case, p. 408, the principal one was cited to the point that an apparent principal may be shown to be a surety, and an apparent surety shown to be a principal.

NICHOLS v. NICHOLS.

[21 VERMONT, 328.]

ADULTERY BY INSANE PERSON IS NOT CAUSE FOR DIVORCE.

LIBEL for divorce. The facts are stated in the opinion.

Heaton and Reed, for the petitioner.

Peck and Colby, for the libelee.

By Court, REDFIELD, C. J. This is a libel for divorce *a vinculo* for the adultery of the wife. The defense was that she was insane at the time. The court are satisfied of the facts alleged, both in support and defense of the libel, and are not satisfied that the act complained of was done in a lucid interval.

The court held that general insanity is a full defense for all acts which by the statute are grounds of granting divorce. In

regard to severity and desertion, there could be no question. There is wanting the consenting will, which is indispensable to give the acts the quality either of severity or desertion. The case is the same in regard to acts of sexual intercourse with one not the husband. If done by force or fraud, no one could pretend that it formed any ground of dissolving the bonds of matrimony. And insanity is even more an excuse, if possible, than either force or fraud. It not only is not the act of a responsible agent, but in some sense it might fairly be regarded as superinduced by the consent or connivance of the husband, since he has the right, and is bound in duty, to restrain the wife, when bereft of reason and the power of self-control, from the commission of all unlawful acts, both to herself and others.

If the husband, knowing the wife's propensity to self-destruction, suffered her to take her own life, he could be regarded as scarcely less than a murderer himself. So, too, in regard to the act complained of. It was in the power of the husband always to guard against such consequences. And if he failed in this duty, he surely could not ask the court to visit the consequence of his own misconduct upon the unfortunate being whom, having sworn to love, comfort, honor, and keep, in sickness and in health, till death, he had chosen to abandon to the short charity of a proverbially heartless world in the hour of her utmost necessity.

And if the case were shown of those to whose care the husband had prudently intrusted his wife for care or for cure (as he might lawfully do) having betrayed or abused this confidence to purposes of crime on their part, as might possibly occur without his fault, he surely could not blame his insane wife for the treachery of his own agents or their assistants. In insanity, it is well known that the subject is liable to such illusions as to mistake utter strangers for the nearest relatives. If, too, they retain only the ordinary stimulus of propensity at such a time, with no power of self-control, they are, of course, at the mercy of every base man. But in many cases sexual propensity is more or less excited during insanity, and the liability to such contingencies proportionally increased.

In such cases, for the husband to seek for a dissolution of the marriage relation must argue great weakness or great depravity.

We have read the case of *Matchin v. Matchin*, 6 Pa. St. 332 [47 Am. Dec. 466], and the opinion of the late Chief Justice Gibson, where he attempts to maintain that the adultery of

the wife, although insane, is sufficient ground of divorce, for the reason that it tends to impose a spurious offspring upon the husband. The reason is one which will have no application to similar acts committed by the husband, and as applied to the wife, seems truly revolting to all just sense of propriety and decency. We are surprised that such an opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American republic.

A majority of the court are of the opinion that the libel must be dismissed.

ADULTERY OF INSANE WIFE IS GROUND FOR DIVORCE, and her insanity is no defense: *Matchin v. Matchin*, 47 Am. Dec. 466. But see note thereto 469, discussing this question at some length and showing the harshness of this rule, as well as its want of authority.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

ANDREWS v. AVORY.

[14 GRATTAN, 229.]

COUNTY COURT OF VIRGINIA IS COURT OF GENERAL JURISDICTION in regard to probates and the grant of administrations; it has jurisdiction of the whole subject-matter, and if error is made in taking jurisdiction of a particular case, the order is not void generally, but only voidable on citation or appeal, and cannot be questioned collaterally. The only exception to the above rule is where the supposed testator or intestate is alive, or where, if dead, he has a personal representative in being when administration is granted upon his estate.

ADMINISTRATION GRANTED BY COUNTY COURT of Virginia is not void, where the intestate resided and died in another state, leaving no estate in Virginia, and having no personal representative in the latter state.

SURETIES OF ADMINISTRATOR ARE RESPONSIBLE FOR ASSETS of the intestate which were situated, at his death, in another state, but afterwards brought to Virginia, and there treated and held as assets by the administrator.

SURETIES OF ADMINISTRATOR ARE DISCHARGED from liability for the proceeds of the sale of certain property of the intestate, but not required for the payment of debts, when such property is taken out of the hands of the administrator, and by a valid decree placed in his hands "as commissioner," to be sold, and the proceeds divided among the distributees.

SUIT against W. T. Ivory, as administrator, and H. M. Spencer and R. Andrews, as sureties on his official bond, for an accounting of the administration of the estate of G. W. Ivory, deceased, who died intestate, leaving an estate consisting of two slaves, a small amount of personal property, and some debts. The remaining facts are stated in the opinion.

Howard and Grattan, for the appellant.

Patton, for the appellees.

By Court, MONCURE, J. The first question which in natural order comes up for consideration in this case is, whether the order of the county court of Mecklenburg, granting to George W. Avory administration on the estate of William T. Avory, was a void order for want of jurisdiction in the court to make it.

It is now well settled that the county court is a court of general jurisdiction in regard to probates and the grant of administrations; that it has jurisdiction in regard to the whole subject-matter; and that though it may err in taking jurisdiction of a particular case, yet the order is generally not void, but only voidable on citation or appeal, and cannot be questioned in any collateral proceeding: *Fisher v. Bassett*, 9 Leigh, 119 [33 Am. Dec. 227]; *Burnley v. Duke*, 2 Rob. (Va.) 102; *Schultz v. Schultz*, 10 Gratt. 358 [60 Am. Dec. 335]; *Cox etc. v. Thomas's Adm'r*, 9 Id. 323; *Hutcheson v. Priddy*, 12 Id. 85. I say the order is generally not void; for there are one or two exceptions to the rule, if exceptions they can be called; as, where the supposed testator or intestate is alive; or where, if dead, he has already a personal representative in being when the order is made granting administration on his estate. If he be then alive, the order is of course void. And so also if he has already a personal representative who stands in his place and is invested with all his rights of personal property in the state: *Griffith v. Frazier*, 8 Cranch, 9. There must be an office, and that office must be vacant in order to a valid appointment of a personal representative. Until then there is in fact no "subject-matter" to be within the jurisdiction of the court. That subject-matter is the appointment of a personal representative to a decedent who has none, and whose personal estate is therefore without an owner. The validity of a order making an appointment must depend on the existence of that state of things. And though the court must inquire into these preliminary facts, and in some sense adjudge them in every case in which it makes an appointment, yet the judgment to that extent is incidental and inconclusive. If, in fact, there be a decedent without a personal representative, an order of a court of general jurisdiction on that subject appointing one is as conclusive on the question of jurisdiction of the particular case as on any other question arising in the case.

I do not understand the counsel of the appellant as denying the correctness of these principles in their application to a case in which some court in the state has jurisdiction, though not the court making the appointment. But I understand them

as contending that they are not applicable to a case in which no court in the state has jurisdiction, and that this is such a case. They say the intestate resided and died in North Carolina, leaving no estate in Virginia, and therefore no court in Virginia had power to appoint an administrator. Suppose it to be true that he did reside and die in North Carolina, leaving no estate in Virginia; would it follow that no court in Virginia had power to make the appointment? Had not the general court power to grant administration in such a case? As the law stood when the order in question was made, the general court had power to grant administration on the estate of any decedent who had not a personal representative in the state, no matter where he resided or died, or whether he left any estate in the commonwealth or not: 1 Rev. Code, 1819, p. 377, sec. 12, 382, sec. 32. Therefore, as some court in the state had power to make the appointment, it would follow, if that were the test, that the order of the county court of Mecklenburg is not void.

But I consider these principles as applicable to every case of a decedent who is without a personal representative in the state, without regard to the question whether any court in the state has jurisdiction of the particular case or not. The subject-matter being within the jurisdiction of the court, to wit, the appointment of a personal representative to a decedent who is without one, the court making the appointment will be considered as having adjudged the question of jurisdiction in the particular case, and the order will not be void. Whether the court had jurisdiction in the particular case or not may depend upon a variety of facts; as, whether the decedent resided in the county whose court made the order, or had land there, or died there, or had estate of any kind there. If, after passing upon these facts, and taking cognizance of the case, the order of the court could, at any after period, in any collateral proceeding, be avoided by evidence that the decedent did not reside, or die, or leave estate in the commonwealth, all the inconvenience and other evils would be produced which are referred to in *Fisher v. Bassett*, 9 Leigh, 119 [33 Am. Dec. 227], and other cases before cited, and which are designed to be prevented by the principles laid down in those cases. In this case, the order was made in March, 1840; the suit was brought in May, 1847; no issue was raised by the pleadings in regard to the validity of the order, and the only evidence relied on to invalidate it is that of a witness whose testimony was taken in 1849, and who states that the decedent lived and died in the

county of Granville, in the state of North Carolina, and that all his property was in that county. How could he know that all the decedent's property was there—that he had not a particle of property, nor a dollar due to him, anywhere in Virginia? How could anybody be expected to know, or be able to prove, at that remote period, what were the facts on which the county court of Mecklenburg took jurisdiction of the case? Can the judgment of a court of general jurisdiction over the subject-matter be overthrown by testimony like this, taken nine years after the judgment, and in a collateral proceeding?

While great evils would result from holding an order appointing an administrator of a decedent who lived and died out of the state and owned no property therein to be void, none whatever would result from holding the contrary. There can be no evil in appointing an administrator of a decedent who has no property. Indeed, nothing is more common; and it is often convenient, if not necessary, to do so, to carry on a suit to which he may be a proper party. That the decedent lived and died out of the state makes no difference. If a non-resident owning no property happen to die here, the court of the county in which he dies is expressly authorized to appoint an administrator.

I therefore think the order in question was not a void order.

The next question to be considered is, whether the sureties of the administrator are responsible for assets of the intestate which were situated at his death in the county of Granville, in North Carolina, but after his death were brought to the county of Mecklenburg, in Virginia, and there treated and held as assets by the administrator.

It is now well settled that a grant of administration has no legal operation out of the state from whose jurisdiction it was derived; and that an executor or administrator appointed in one state is not, in virtue of such appointment, entitled to sue nor is he liable to be sued in his official capacity in any other state or country: Story's Conf. L., sec. 514. There are some apparent exceptions to this rule, though they are not really so. In equity, an executor or administrator is sometimes liable to be sued in another state or country, under the peculiar circumstances of the case, as in *Powell v. Stratton*, 11 Gratt. 792; and sometimes to avoid a failure of justice, as in *Tunstall v. Pollard's Adm'r*, 11 Leigh, 1, and other cases cited in 1 Rob. Pr., N. S., 178, 192. In these cases, it cannot be said that the suit is against him in his official capacity, but on the ground of a

personal trust, which makes him liable, under certain circumstances, to account in a court of equity, where he may be found, to those entitled to the estate, wherever it may be situate: *Governor v. Williams*, 3 Ired. L. 152 [38 Am. Dec. 712]. So, also, if an executor or administrator reduce property of his testator or intestate into possession, he may afterwards sue for it in another state, even at law; but the suit must be brought in his own name, and not in his official capacity. He is, to all intents and purposes, the legal owner of the property, though for the benefit of other persons: Story's Conf. L., sec. 513; 1 Lomax on Executors, 341, marg.

In order, therefore, to reduce the assets into possession, and close the administration and distribution of a decedent's estate, it is generally necessary that there should be a personal representative in every state in which the assets may be situate. They are subject to the payment of debts according to the law of the *situs*, but to distribution according to the law of the domicile. It is therefore a matter of convenience that the surplus of the assets remaining in the hands of a local administrator after the payment of debts should be sent home, that is, to the domiciliary administrator, for distribution. And this seems to be the course generally pursued, though the distribution may be made by the local administrator. Whether the one course or the other will be pursued in any particular case depends upon the local law and the judicial discretion of the local court. If the surplus be paid over to the domiciliary administrator, it is matter of national comity, and not of right. Every state is bound, to the extent of its power, to take care of the rights of its own citizens. And therefore it will see that the estate of a decedent within its jurisdiction is properly applied to the satisfaction of their rightful claims, whether as creditors, legatees, or distributees of the decedent. But those claims being satisfied, it has no longer any motive to retain the fund, and will not, unless it be more convenient to dispose of the subject fully and finally than to send it home for that purpose. If none of the citizens of the state have any claim upon the fund, either as creditors, legatees, or distributees, and the aid of its courts be not invoked by a foreign claimant, it will have no motive to interfere with the fund, or prevent the domiciliary administrator from obtaining possession of it if he can. Of course he cannot sue for it, and if he cannot obtain possession otherwise, he or some person else must become local administrator. He will be preferred to any person else, as he will have the ultimate receipt and distribution of the fund.

But it very often happens, and especially in the United States, where there are so many states adjacent to each other, separated only by an imaginary line, and where there is so much commercial and social intercourse between the citizens of different states, and such frequent changes of residence from one state to another, that an administrator in one state receives property or money belonging to his intestate in another without any administration being taken there, and holds it in his own state as assets of his intestate. And it sometimes, if not very often, happens that property of a decedent is carried, or one of his debtors removes, from a state in which there is no administrator to another in which there is one, and the property or debt is received and held as assets by the administrator there. Can it be contended that the sureties of the administrator are not liable for property or money so received and held by him as assets? Does it lie in their mouths any more than in his to deny that that they are what he, by his act, has affirmed them to be? Is it enough for them to say that their principal could not have recovered the property or money, if the person having possession had refused to deliver or pay to him? that such person may be liable to deliver or pay it over again to a local administrator, if one should be hereafter appointed? that the grant of administration, and the condition of the administration bond, are confined to property which actually belong to the decedent, and was situated at the time of his death within the limits of the jurisdiction which made the grant? I think not. The terms of the administration bond expressly apply to all the goods, chattels, and credits of the decedent which shall come to the hands of the administrator. We have seen that a domiciliary administrator generally receives any surplus remaining in the hands of a local administrator on the settlement of the account of the latter. And if the same person be, as he often is, both domiciliary and ancillary administrator, while he is first accountable in either character according as he receives assets in one or the other, it is his duty to pass over the surplus remaining in his hands as ancillary, to his hands as domiciliary, administrator. Are not his sureties as domiciliary administrator liable for the surplus so received or passed over?

In *Adams's Heirs v. Adams's Adm'r*, 11 B. Mon. 77, the sureties of a person as ancillary administrator were discharged from liability for assets received in that character, on the ground that he should be regarded as holding them as domiciliary administrator. If they were properly discharged, his

sureties as domiciliary administrator were of course chargeable: See 1 Rob. Pr., N. S., p. 189, sec. 4, and cases cited. There is no difference between the form of the grant and bond in the case of a domiciliary and in the case of an ancillary administration. And if the former may operate upon assets received and held by the administrator as such within the state, though situated abroad at the decedent's death, why may not the latter? In the case before stated, of property of a decedent being carried, or one of his debtors removing, from a state in which there is no administrator to another in which there is one, I do not see how the estate of the decedent could ever get the benefit of the property or money, unless it could be recovered by the administrator in the state to which it is removed, because there is no other administrator; and if one should be appointed, he could not, as we have seen, sue as such in another state. I know of no exception to that rule. It is true that the title of an administrator relates back to the death of his intestate, so as to enable him to sue for causes of action arising between that period and the date of his appointment. But he must, in such a case, I think, sue in his capacity of administrator, and not in his own right. When he has once acquired actual possession of the property, he has then a legal title to it, which he can thereafter assert in his own name: Story's Conf. L., sec. 516. He must, of course, sue in his capacity of administrator for causes of action accruing in the life-time of his intestate.

It would hardly be contended that where, in an ordinary case, an administrator as such sues for, recovers, and receives, or demands and receives without suit, property or money, and holds it as assets of his intestate, the sureties of the administrator could exonerate themselves from liability therefor, merely by showing that it did not in fact belong to the intestate. *A fortiori* it would seem they could not, merely by showing that though such property or money did, in fact, belong to the intestate, yet it ought to have been received by some other administrator in some other state, who may never have been appointed; or if appointed, may never have claimed it, or even been entitled to sue for and recover it.

In *Burnley v. Duke*, 2 Rob. (Va.) 102, it was held that though an administrator *de bonis non* cannot recover of a former administrator assets converted by him (because they are not unadministered assets, and therefore not within the scope of the commission of the administrator *de bonis non*), yet if he actually receive them, he and his sureties are accountable

therefor. In that case if the sureties of the administrator *de bonis non* had not been responsible, the sureties of the original administrator would have been. The question was, Which of two sets of sureties was responsible? One or the other certainly was; and in either aspect, those entitled to the estate had an ample and effective remedy. It would seem to be still more reasonable to hold the sureties of an administrator responsible for assets received by him as such, when those entitled to the estate would otherwise have no security whatever. The bond of an administrator *de bonis non* is expressly limited to the assets which are unadministered, while the bond of an original administrator is unlimited in its terms, and extends to all the assets which may come to the hands of the administrator. If the sureties of the former are liable for assets received by their principal, though derived from a subject not embraced by the limited terms of their bond, why are not the sureties of the latter liable for assets received by their principal, and therefore embraced by the general terms of their bond, though derived from a subject at one time situated out of the state? I think that wherever an administrator receives or holds within the state in which he was appointed, property or money as assets of his intestate, he and his sureties are accountable therefor as assets, unless it be clearly proved that such property or money belongs to some other person to whom the administrator personally has accounted, or will have to account for the same.

I have examined, I believe, all the cases referred to in the argument on this branch of the case, and I am not aware that there is one of them in conflict with the conclusion to which I have come, though there are *dicta* in some of them which may be so. Without undertaking to review them, I will notice only the case of *Fletcher's Adm'r v. Sanders*, 7 Dana, 345 [32 Am. Dec. 96], which is perhaps the strongest case cited by the counsel of the appellant in support of their view. In that case it was held that the surety of an executor to whom letters testamentary were granted in Kentucky (which, however, was not the place of the testator's domicile at the time of his death), was not responsible for assets received in a foreign state, and never brought to Kentucky. Upon the ground that they were never brought to Kentucky, the opinion of the court was expressly placed. And even in that opinion, one of the three judges who composed the court did not concur. Most of the cases on this subject, and no doubt all that are material, are

cited and commented upon in Story's Conf. L., secs. 507-529; and in 1 Rob. Pr., N. S., 159-194.

I have stated my opinion as to the principles of law which seem to be applicable to this case, and it now only remains, so far as this branch of it is concerned, to apply them to the facts of the case, which can be easily done. In 1840, William T. Ivory died in Granville county, North Carolina, intestate, unmarried, and without issue, leaving a small personal estate in that county, and no estate, so far as the record shows, anywhere else. He left seven distributees at law, who were his mother, brothers, and sisters; all of whom (except perhaps one sister, who may have resided with her husband in North Carolina), seem to have resided in Mecklenburg county, Virginia, which adjoins Granville county, North Carolina. His debts were very few in number and small in amount, and most of them were probably due in Virginia. He had lived in Granville county but a year before his death, and doubtless had removed to that county from Mecklenburg, Virginia, where the rest of the family resided. His brother, George W. Ivory, who lived with his mother at the time of his death, and for several years thereafter, and was guardian of several of the distributees, who were infants, qualified as his administrator soon after his death, to wit, in March, 1840, in the county court of Mecklenburg, giving the usual bond with surety in the penalty of four thousand dollars. He immediately took possession of the property in North Carolina, and held it, or its proceeds, in Virginia, as assets of his intestate. The perishable property was sold by him in May, 1840, about two months after he qualified, on a credit of twelve months, the bonds being taken payable to himself as administrator. Whether the sale was in Virginia or North Carolina does not appear. The slaves were sold in Virginia in July, 1840, under a decree of the county court of Mecklenburg, made in May, 1840. He received a debt due to his intestate, but whether he received it in the one state or the other does not appear. It does not appear that any person ever administered in North Carolina, or had any interest in having administration granted there. It is extremely probable, from all the circumstances, that the contrary is the fact, and that it was deemed to be best by the parties concerned to have but one administration, and to have that in Virginia, where all, or nearly all, the distributees and creditors resided. Upon this state of facts, I have no difficulty in coming to the conclusion that the sureties of the administrator became responsible

for the assets so received and held by him in Virginia, though situate, at the death of his intestate, in North Carolina.

The next question to be considered is, whether the sureties of the administrator have been discharged from that liability as to the slaves belonging to the estate of the intestate, by reason of the decree of the county court of Mecklenburg, made in May, 1840, appointing George W. Avory commissioner to sell the said slaves, divide the proceeds among the distributees, and by reason of the sale made under that decree and the other circumstances of the case.

I think this question must be answered in the affirmative. The slaves were not required for the payment of debts, and the administrator had, therefore, no right to sell them. He was willing at once to surrender them to the distributees for partition, and did in effect do so. He was himself a distributee, and was guardian of two others. The slaves could not be divided in kind, and a sale was therefore necessary for the purpose of division. But some of the distributees were infants, and a decree for a sale was therefore obtained. That decree was made in a suit to which George W. Avory and his two wards were defendants, and all the other distributees were plaintiffs. George W. Avory was not a party to the suit as administrator, thus showing that he had in effect surrendered the slaves to the distributees for partition. The bill alleges that he had paid all the debts of his intestate without a sale of any of the slaves, and prays for a decree for a sale of the slaves and division of the proceeds. The defendants answered the bill, admitting its allegations, and expressing their willingness that the court should decree according to the prayer thereof. And a decree was accordingly made. Shortly after the decree, to wit, on the first of July, 1840, the sale was made by George W. Avory as commissioner, at public auction, on a credit of twelve months, as prescribed by the decree; at which sale he purchased one of the slaves, and another distributee the other. No report of the sale was made, and no other order appears to have been made in the suit until May, 1847, about the time of the institution of this suit, when, on the partition of the plaintiffs, the order of sale made seven years before was set aside. The record does not contain a copy of the petition, if it was in writing, nor show the grounds of it. Nor does it appear that the administrator or his sureties had any notice of the petition or motion to set aside the order of sale. The bill in this suit, which was filed by the same persons who were plaintiffs in the

suit for the sale of the slaves, alleges that "the slaves were sold by the administrator under a pretended order obtained by him from the county court of Mecklenburg, under some false pretext, without the knowledge or consent of the complainants, and which order was afterwards set aside by the said court." The administrator being a non-resident of the state, and it seems insolvent also, never answered the bill. The sureties, in their answer, rely upon the suit and decree for the sale of the slaves, and the proceedings under the decree, for their exoneration from any liability on account of the slaves. There is no proof in the record to sustain the vague allegation contained in the bill of fraud on the part of the administrator in obtaining the order of sale. It devolved on the plaintiffs to prove it. The sureties do not admit it in their answer, though they do not in terms deny it, doubtless because they had no information on the subject. But the circumstances of the case strongly tend to disprove the allegation. The sale was made at public auction in the neighborhood of the distributees, one of whom (besides the commissioner himself) was a purchaser at the sale, and none of whom complained of it until seven years after, when the commissioner had become insolvent and left the state. There is no such irregularity, if any, on the face of the proceedings, as avoids the decree for the sale of the slaves. It must be regarded, then, as a valid decree at the time it was made; and the effect of it was to take the slaves out of the hands of George W. Avory as administrator, and place them in his hands as commissioner of the court. The sureties of the administrator were thereby as completely discharged from liability as they would have been if the administrator and commissioner had been different persons, and the former had delivered the slaves to the latter under the decree. That liability, being once discharged, was not revived by the order made seven years thereafter setting the decree aside, whether that order was regularly made, or was itself valid, or not—a question which it is therefore unnecessary to determine.

The only other question which it will be necessary to notice is as to the propriety of charging the administrator and his sureties with the amount of the bond of Henry W. Avory to the intestate for two hundred and fifty-four dollars and twenty-eight cents, due the first of March, 1839. I concur in the opinion of the circuit court upon that question, and for the reason expressed in the opinion, to wit: "The payment of the same having been proved by one of the persons interested

therein as distributee, and his deposition never having been taken in the cause, since the release of said interest, to prove said payment."

The result of my opinion is, that the administrator is chargeable to the distributees in the sum of six hundred and sixty-seven dollars and eleven cents, with interest on four hundred and fifty-five dollars and thirty-six cents, part thereof, from September 1, 1848, being the balance due on his administration account, without charging him with the proceeds of the sale of the slaves. The decree should therefore be reversed with costs, and a decree entered in conformity with this opinion.

ALLEN, P., and LEE and SAMUELS, JJ., concurred in the opinion of MONCURE, J.

DANIEL, J., dissented.

Judgment reversed.

JURISDICTION OF PROBATE COURTS of Virginia is general respecting matters testamentary: *Schultz v. Schultz*, 60 Am. Dec. 335; so is that of the court of ordinary of Georgia: *Tucker v. Harris*, 58 Id. 488, and note 503; and that of the orphans' court of Alabama: *Apperson v. Cottrell*, 29 Id. 239; but probate courts have generally only a limited and inferior jurisdiction; *Grimes's Estate v. Norris*, 65 Id. 545; *Morrow v. Weed*, 66 Id. 122; *Wyatt's Adm'r v. Rambo*, 68 Id. 89; *Haynes v. Meeks*, 70 Id. 703, and notes to these cases; but the appointment of an administrator cannot be collaterally attacked or impeached: *Driggs v. Abbott*, 65 Id. 214; *Riser v. Snoddy*, Id. 740; *Abbott v. Coburn*, 67 Id. 735.

ADMINISTRATION CAN BE GRANTED only in the county where the deceased resided at the time of his death; if otherwise it is void: *Johnson v. Corpenning*, 44 Am. Dec. 106; *Fletcher's Adm'r v. Sanders*, 32 Id. 96; *Moore's Adm'r v. Philbrick*, 52 Id. 642, and note; *Beckett v. Selover*, 68 Id. 237.

LIABILITY OF SURETY OF EXECUTOR for assets of non-resident when such assets are brought into the state: *Fletcher v. Sanders*, 32 Am. Dec. 96; and note 106.

COURT HAVING JURISDICTION OVER CERTAIN CLASS OF CASES, its error in adjudging some particular case belonging to that class, which properly pertains to a court of the same authority in another locality, does not make the judgment void, but simply voidable by a direct proceeding for that purpose: *Coltart v. Allen*, 40 Ala. 157; *Gibson v. Beckham*, 16 Gratt. 327, 328; and where the court has jurisdiction of the subject-matter and of the parties, its decree cannot be collaterally attacked or impeached for any defect, irregularity, or error in the proceedings, however manifest or palpable it may be: *Shelton v. Jones's Adm'n*, 26 Id. 898; *Ballard v. Thomas & Ammon*, 19 Id. 21; *Woodhouse v. Fillbates*, 77 Va. 321; *Irwin v. Scriber*, 18 Cal. 505. If such error is never reversed, it cannot be alleged that the decree was void: *Pamill's Adm'r v. Calloway's Committee*, 78 Va. 394, all citing the principal case.

THE PRINCIPAL CASE IS QUOTED FROM, approved, and followed as to the point contained in the last section of syllabus *supra*, in *Odell v. Houle*, 77 Va. 365.

EYRE v. JACOB.

[14 GRATTAN, 422.]

PROCEEDING BY INJUNCTION IS PROPER MODE by which to test the legality of a levy made by an officer under the supposed authority of a law, the constitutionality of which is denied.

ALTHOUGH VIRGINIA CONSTITUTION PROVIDES that taxes shall be equal and uniform, it is within the constitutional power of the legislature to impose a tax upon the transmission of estates by devise or descent, and prescribe the rate of the same.

VIRGINIA LEGISLATURE, BY ACT OF MARCH 2, 1854, imposed a tax and fixed the rate thereof on estates transmitted by devise or descent; but at the subsequent session the legislature omitted to fix any rate on such tax in the tax law of March 18, 1856: *Held*, that the failure to fix a rate in 1856, without any repeal of previous laws prescribing the tax and fixing its rate, did not operate to release a tax accruing in 1855; and that the act of 1854 must remain in force until expressly repealed or replaced by other provisions plainly intended to be substituted in its stead.

APPLICATION for an injunction. John Eyre, deceased, of Northampton county, by will, constituted plaintiff, Severn Eyre, his residuary devisee and legatee, and also appointed him as one of his executors. The total value of the estate of deceased in the hands of the plaintiff, as assessed by the sheriff of said county, was one hundred and twenty-three thousand four hundred and forty-three dollars. This property, it was claimed by the sheriff, was liable to assessment and tax under an act of the legislature of March 2, 1854, prescribing a tax, and fixing its rate, on collateral inheritances. The sheriff therefore levied upon said property; and plaintiff applied for an injunction restraining the sale thereof, on the ground that said act of 1854 was unconstitutional. The injunction was granted, but afterwards, upon defendant's motion, it was dissolved, and plaintiff appeals.

Morse, for the appellant.

J. R. Tucker, attorney-general, for the appellee.

By Court, **LEE, J.** The regularity of the proceeding by injunction in this case, although discussed by the counsel for the appellant in his opening argument, was not controverted by the attorney-general. He was understood to concede that it is a proper mode by which to test the legality of a levy made by an officer under the supposed authority of a law the constitutionality of which is denied. Upon this point, therefore, I shall content myself with referring to the cases of *Goddin v. Crump*, 8 Leigh, 120, and *Bull v. Read*, 13 Gratt. 78, and authorities there cited. It might perhaps admit of more

question whether a court of equity would, as a matter of course in such a case as this, interfere by way of injunction to restrain the act of an officer, not because the constitutionality of the law under which he is proceeding is called in question, but because the existence of any such law is absolutely denied. Upon this question, however, I think it may be unnecessary to express any opinion.

The commonwealth being the party substantially interested in the subject-matter of controversy, it might have been more regular under the provisions of the act entitled "An act regulating the jurisdiction of the circuit courts," passed May 22, 1852, Sess. Acts 1852, p. 58, sec. 3, that this suit should have been originally instituted in the circuit court of the city of Richmond in order that the commonwealth might be duly represented by the proper officer, and such officer should of course have been made a party defendant. As, however, the suit was subsequently removed to that court, in conformity to the provisions of section 8 of chapter 46 of the code, p. 239, and the auditor of public accounts, who had been made a party by an amended bill, duly appeared and filed an answer, all difficulties as to parties and the regularity of the hearing before the circuit court of Richmond city may be considered as overcome, and we may proceed to consider the case upon its merits.

The object of the bill was to test the legality of the levy made by the sheriff of Northampton upon the property of the appellant to enforce payment of the tax claimed to be due to the commonwealth under the several provisions of law imposing a tax upon the transmission of estates by devise or descent to any other person or use than those specified, and prescribing also the rate of the same. The provisions under which the tax was claimed to be due are those of chapter 35 of the code, sec. 10, and sec. 42, pp. 179, 184, and of chapter 39, from sec. 6 to sec. 12, inclusive, pp. 214, 215, and the act entitled "An act imposing taxes for the support of government," passed March 2, 1854, sec. 15; and the legality of the sheriff's proceeding was denied, because, as it was alleged, the several provisions of law above cited, including the fifteenth section of the last-named act, were unconstitutional, inoperative, and void. And in the argument here, the further ground was taken by the counsel for the appellant that, in point of fact, when this levy was made there was no law upon the statute-book authorizing or requiring such a levy to be made, the act of March 2, 1854, having expired or been replaced by the act of March 18, 1856,

which contained no provision for a tax upon a subject of this character.

It has always been considered to be a most delicate office for a judge to undertake to pronounce an act of the legislature to be unconstitutional and void. It is substantially to repeal the obnoxious law, and thus in effect to exercise a power properly belonging to another department of the government. "The question," says Judge Marshall, "whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case." "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law must be such that the judge feels a clear and strong conviction of their incompatibility with each other:" *Fletcher v. Peck*, 6 Cranch, 87. "The question whether a law is in accordance with the constitution," says Judge Brooke, "is at all times a very delicate and important question." "It should not be in a doubtful case that the acts of that body [the legislature] should be decided by the courts to be unconstitutional:" *Sharpe v. Robertson*, 5 Gratt. 518, 642. "The duty of inquiring into and deciding upon the legal validity of an act of the legislature has always been regarded by this court, and justly, as one of the most delicate it can be called upon to discharge:" *Per Daniel, J.*, in S. C., 574. Where a plain and palpable infraction of constitutional provision is shown in a law, upon the validity of which it is called upon to decide, it is of course one of the highest and most solemn duties of the court to declare such law to be inoperative and void. If, however, it be only upon slight implication or inconclusive reasoning that the supposed infraction can be made out, the court should never undertake to rescind and annul the solemn and deliberate act of the legislative department of the government. To doubt, in such a case, should be to affirm.

There is certainly one proposition which will not be questioned, and that is, that the legislature possesses the full, absolute, sovereign power of taxation, excepting so far as it may have been surrendered to the general government, or may be interdicted by the constitution of the United States, or as it may be controlled by the restrictions and mandates of the constitution of the state: See *City of Richmond v. Daniel*, 14 Gratt. 885, opinion of Samuels, J. And this power it is most impor-

tant should be sustained and upheld as essential to the very existence of the government of the state, and as providing the means for vindicating her sovereign authority: See *Providence Bank v. Billings*, 4 Pet. 514; *Weston v. City Council of Charleston*, 2 Id. 449. We do not go to our constitution to see what powers of taxation are given to the legislature, but to ascertain what restrictions and limitations upon its general sovereign power are imposed by its provisions. If, therefore, the power to tax any subject whatever is not excluded by the terms of the constitution, or by necessary and inevitable implication, it must exist in the general assembly to be exercised at the discretion of that body as wisdom and a proper sense of justice shall direct.

The counsel for the appellant does not controvert this position, but he insists that the particular tax in question, though not expressly and in terms prohibited by the constitution, is yet as effectually prohibited by the most necessary implication from its provisions as if the power to impose it had been expressly denied. He insists that it is in effect purely a tax on property, or if it is not to be regarded as a tax on property, but on a benefit or privilege to the citizen, that the power to impose it is excluded because it is not enumerated amongst those authorized to be imposed by the twenty-fifth section; and whether a tax on property or privilege, it is equally violative of the twenty-second section of the fourth article of the constitution, which declares that taxation shall be equal and uniform throughout the commonwealth. He also maintains that if it is to be considered a tax on property, it conflicts with the provision of the twenty-second section, which declares that all property other than slaves shall be taxed in proportion to its value, and with the twenty-third section of the same article, regulating the taxation of slaves.

If this tax were properly to be considered as a tax on property, there would be great force in the argument of the counsel. As the ordinary annual tax had been assessed upon the decedent, this would then appear to be a second taxation of the same subject, with the additional assessment upon all the slaves, of whatever age and at their real value. But such, I think, is not its true character. It cannot be regarded in a proper legal sense as a tax upon property. The property tax which the framers of the constitution were contemplating in the twenty-second section was the ordinary annually recurring tax for the support of government, laid upon all property what-

soever. They had no reference to casual subjects of taxation occurring irregularly and occasionally, which though connected with property were yet readily to be distinguished in their essential character and features. If the tax imposed had been a fixed and arbitrary sum, it would scarcely have been said to be a tax on property; although every tax for which the property of the tax-payer is liable might be called a tax on property in a certain sense. But the argument is, that as the tax is a certain *per centum* of the value of the estate, and the property pays it, it is therefore a tax on the property itself. But this is by no means a necessary logical conclusion. The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred; to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment; and as it was thought just and reasonable that the amount of the premium should bear a certain proportion to the value of the subject enjoyed, it is fixed at a certain *per centum* upon the value of the whole estate transmitted. And of this surely there can be no just complaint; on the contrary, it would have been unequal and unjust to require that a party receiving an inconsiderable property should pay as high a premium as one who takes a large and valuable estate. It is perfectly in accordance with the principles of natural justice and the spirit of the constitution that the tax upon such a subject should be regulated in strict proportion to the value of the benefits which it secures.

The case of *Brown etc. v. State of Maryland*, 12 Wheat. 419, was cited by the counsel. In that case, it was held that the prohibition in the constitution of the United States to the states to lay duties or imposts on imports or exports prevented them from requiring the importer to take out a license and pay a tax before he could be permitted to sell the articles by the bale or package; and that the requirement of such a license and tax before the importer could sell also conflicted with that provision of the constitution which declared that congress should have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. The court considered that, as the importer had paid the duty imposed by the act of congress, he thereby acquired the right not only to bring the articles into the country, but also to dispose of them afterwards, that being the essential object of the importation and the motive for paying the duty. But I do not perceive how this touches the question in our case. It was not

decided that a tax on the *transitus* of property and on the property itself were one and the same; but it was held that both the right to import and the right to sell the merchandise after it was imported were secured to the importer by the payment of the duty imposed by the act of congress, the power of conferring both these rights having been appropriated to the general government by the constitution, and necessarily, therefore, denied to the states.

The objection that the tax is not levied upon the heir or legatee, but is to be paid out of the estate of the decedent, and that therefore it cannot be considered a tax upon the privilege of succeeding to the property, is, I think, more specious than real. Whether the tax is paid by the personal representative before he turns over the estate to the party entitled, or by the latter after he receives it, the effect is the same. It is in either case a premium paid for the right enjoyed, and the value of the estate is exactly diminished by the amount of the premium. Nor does the manner in which the tax is spoken of in the code and subsequent acts at all change its real character. It is spoken of as a tax on "decedents' estates," but in immediate connection with their transmission under the statute of wills or the laws regulating descents and distributions; and the character of the tax is not to be fixed by any isolated words that may be employed, but they must be taken in the connection in which they are used, and the true character is to be deduced from the nature and essence of the subject.

That the general assembly of Virginia, in the absence of a constitutional prohibition, does possess the power to tax a civil right or privilege like this is beyond all question. This is fully embraced within its general and comprehensive power upon the subject, to which allusion has already been made. But it may be deduced from the very nature of the subject itself. The right to take property by devise or descent is the creature of the law, and secured and protected by its authority. The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, say to his lineal descendants and ascendants; it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may to-morrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party his property shall be applied to the payment of his debts, and the residue appropriated to public uses.

Possessing this sweeping power over the whole subject, it is difficult to see upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as the condition upon which those who take the estate shall be permitted to enjoy it can be successfully questioned. That the tax is confined to collateral inheritances and devises to others than those specified, presents no difficulty. It is the will of the legislature to make this discrimination, and its discretion upon the subject must be regarded as having been duly and properly exercised.

Assuming, then, that this is a tax upon a civil right or privilege, which the legislature may impose if there be no prohibition in the constitution, we are to inquire whether there be any such prohibition. None certainly in terms is to be found in that instrument, but it has been argued that as it is not one of the subjects named in the twenty-fifth section, the power to impose it is excluded by necessary implication, upon the principle, *Expressio unius exclusio est alterius*. But this argument would prove too much, for it would sweep away the taxes on deeds, suits, notarial seals, and that class of subjects the constitutionality of which has never been questioned by any one. It would restrict the whole power of taxation to the particular subjects named in the twenty-second and three following sections. But this, surely, could not have been designed by the framers of the constitution. If those four sections had been entirely omitted, no one can doubt that the legislature would have had full power to tax all the subjects to which they relate. The three first of these were plainly not intended to confer a power of taxation; they prescribe rules by which the power already supposed to be possessed by the legislature shall be exercised. The language of the twenty-fifth section is somewhat different, and might seem to be permissive in its character; but the section seems rather to be introduced for the purpose of imposing a restriction than of conferring a power. All property was to be taxed *ad valorem*, and taxation was to be equal and uniform; but if it should be deemed expedient to tax incomes and licenses, the property from which the income was derived, and the capital invested in the business for which the license was required, were to be exempted. Or it may have been thought that as all property was to be taxed, a doubt might arise whether a tax on incomes and licenses could be substituted for one on the property or capital, and therefore the particular language was used to remove such doubt, and

show that the legislature had an election as to which of the subjects should be made to bear the tax. Why "salaries" was also named may not be so apparent. It may be that it was intended by just implication to exclude the power to tax the office or employment from which the salary proceeded and the salary itself. Or it may be that as "incomes" had been mentioned, it was thought the kindred subject of "salaries" should also be made to exclude any conclusion from its omission that the power to tax them was not intended to be exercised by the legislature; and thus that the section was intended to make a qualification, and to remove doubts, but not to tie up the hands of the legislature so as to restrict the power of taxation to the property tax, capitation tax, and tax on incomes, salaries, and licenses. But however this may be, it seems to me that where a general sovereign power exists, to be exercised at the pleasure of the legislature over numerous different subjects, it would be very unwise and unsafe to hold that because a few of those subjects may have chanced to be named for some particular purpose or in some particular connection in the instrument which is intended not to confer but to restrict its powers, therefore all others were impliedly excluded. To my mind, there is not that necessary and inevitable implication which alone can supply the place of an express and positive prohibition.

If the power of taxation, then, was intended to be exercised over other subjects than those named in these sections, it is not surprising that in their number this tax should have a place. It is a tax of great antiquity, having been imposed upon the Romans as early as the days of the Emperor Augustus. It was adopted by various nations of Europe, and altogether with the tax on transfers of property among the living constituted in ancient times, according to a learned writer, one of the principal branches of the revenue of the feudal crown. See Smith's *Wealth of Nations*, 387 et seq. In modern times, it is in some shape or other a tax of frequent imposition, and that it was not introduced into our system at an earlier day was perhaps only owing to the fact that the exigencies of the treasury had not sooner required a resort to other subjects of taxation than those previously adopted. It was first imposed, I believe, by the act of 1843-4, and at the late revisal of 1849 was re-enacted as a regular and permanent tax. And at the first session of the general assembly after the new constitution was adopted, and when the contemporaneous history of that instrument must be supposed to have been fresh in the mem-

ory of the law-makers, it was recognized as a valid existing subject of taxation, and the rate fixed at which it was to be levied.

If this tax is not to be regarded as a property tax, the counsel concedes that the *ad valorem* principle cannot be applied to it, and therefore that it is not within that provision of the twenty-second section, nor those of the twenty-third section; but he argues that every tax, of what nature soever, is within the principle of equality and uniformity prescribed in the twenty-second section, and that this tax is violative of that provision.

I think it may well be questioned whether all the provisions of the twenty-second section are not to be confined to taxes on property. The argument to show that the principle of equality and uniformity was intended to apply to them alone is at least strong and persuasive. The contemporaneous history of the constitution proves that this section grew out of the supposed antagonism between the eastern and western portions of the state in respect of the slave property so predominant in the former. Had the interests of all portions of the state been uniform and homogeneous, the principle of representation would have afforded adequate protection to the tax-payer against injustice and oppression, and no such provision would have been introduced. As they were deemed otherwise, a guaranty was demanded, and the controversy was adjusted by the concession of the provisions of the twenty-second and twenty-third sections: See *Gilkeson v. Frederick Justices*, 13 Gratt. 577, opinion of Samuels, J.; *Slaughter's Case*, Id. 767, 775, opinion of same judge. Now, the reason of these sections cannot extend to subjects as to which no discrepancy of interests exists. This discrepancy is in the matter of property alone, and there can be no sectional difference in respect of devices or descents to collaterals any more than there can be in respect of incomes, salaries, notarial seals, and the like.

A similar provision is to be found in the constitutions of several others of the states, and the same terms, "equal and uniform," are employed in most of them. In the constitutions of Tennessee, Louisiana, Arkansas, Massachusetts, Illinois, Texas, Wisconsin, Michigan, and California, the rule of equality and uniformity is enjoined, either in terms or by equivalent expressions; and in giving them construction, it has been held in several of the states that the terms "equal and uniform" apply only to a direct tax on property, and that the clause by which such equality and uniformity is prescribed does not

limit the power of the legislature as to the objects of taxation, but is only intended to prevent an arbitrary taxation of property according to kind or quality, without regard to value. Hence specific taxes have been sustained as a valid exercise of the legislative power: *Portland Bank v. Apthorp*, 12 Mass. 252; *Sawyer v. City of Alton*, 3 Scam. 127; *People v. Dorr*, *People v. Hussey*, cited in Sedgwick on Stat. & Const. L. 558, note; *Aulanier v. Governor*, 1 Tex. 653; Sedgwick on Stat. & Const. L. 554 et seq.

In view, then, of the construction of these terms which has prevailed elsewhere, and bearing in mind the particular reason which led to the adoption of the twenty-second and twenty-third sections, the inference is strong that property only was in the minds of the framers of the constitution; and it is further strengthened by the fact that, although incomes and salaries as well as property of assessable value may be brought under the rule, yet there is a large class of subjects—such, for example, as licences—which do not admit of a tax strictly equal and uniform in the sense contended for; and thus the constitution is to be made to conflict with itself, and a large and important branch of the revenue is to be cut off because it cannot be brought within the rule of exact equality and uniformity. It is true, the language used is broad enough to cover everything; and if it be conceded that the rule must apply to all subjects, yet, as remarked by Judge Samuels, in *Slaughter's Case*, 13 Gratt. 767, it can only be so applied so far as practicable. If a given subject be only susceptible of a modified application of the principle, it must receive this, and not be rejected because the rule cannot be applied with perfect precision to its whole extent and in all its results: See *Aulanier v. Governor*, above cited, p. 660.

In this view, I do not perceive wherein the inequality and want of uniformity complained of can be said to consist. To say that the decedent's estate is charged with the regular annual tax, and therewith the additional tax on the transmission to his collateral heirs or devisees, and thus charged with taxes greater than those imposed on other citizens, is but to repeat the argument that it is a property tax, which I have already considered.

The tax is equal and uniform throughout the state as far as it is susceptible of the application of the rule. It is the same everywhere upon the succession to estates of equal value of whatever subjects they may consist. Every person, everywhere, who takes by this succession, pays a tax for the privilege, and

this tax is proportioned to the value of the interest which he acquires. But in this, it is said, there is a want of uniformity; that unlike the tax on deeds, seals, and the like, it is not fixed at a sum certain, the same to all, but varies according to the value of the estate taken. In other words, that the legislature, in seeking to carry out the principle of equality, as far as practicable, have destroyed that of uniformity. I think there is no force in the objection. To such subjects as deeds, seals, etc., it may be that the principle of equality cannot be applied. The legislature have thought so; certainly they have not attempted to apply it. But to the succession to property, as between those who constitute the class of such beneficiaries, the application is easy and simple, and the legislature have sought to make it by fixing the tax at a certain per centum upon the property acquired; and have in this mode, as far as practicable, carried out the rule of equality and uniformity. Nor does the exemption where the estate is of less value than two hundred and fifty dollars constitute a necessary departure from it. The legislature may define the class to which this tax shall be restricted as they in their discretion may think just and proper, taking care to render it uniform with all those who constitute the class; or as they are authorized to exempt any particular subject from taxation, it may be regarded as an exemption in favor of those entitled to inconsiderable estates, of less value than the sum named; and we must take it that the adoption of the tax as it stood in the code, after the new constitution, amounted to an exemption by the constitutional majority of all those falling under the minimum prescribed.

But it is said that the principle of taxation in cases like this is of dangerous tendency and inadmissible, because, if allowed, the legislature may, under the form of taxing transfers and sales of slaves between the living, impose taxes to any amount whatever upon that species of property, and thus break down the guaranty which it was the intention by the compromises of the constitution to afford to the eastern people against injustice and oppression. It is the argument oft repeated of the possible abuse of power, and may be urged with equal truth of any power whatever possessed by the legislature, however indisputable, or how indispensable soever its exercise may be for the public welfare. Any power wielded by mere human will may be abused. For myself, I do not question the power of the legislature, by requiring a license or otherwise, to impose a tax upon the sale of slaves, any more than I do that of imposing a tax upon the sale of cattle or any other property, or a tax on

stamps, if the exigencies of the public finances should be such as in their opinion to render a resort to such a source of revenue necessary, whatever might be my opinion as to the wisdom and policy of imposing burdens of this character. But the power to impose such a tax is one thing; the expediency and propriety of its exercise is another and a very different thing. The legislature has seen proper to lay a tax upon the alienation of real estate—for such in effect is the tax upon deeds—and I have never heard its constitutionality called in question. The possibility that the general assembly may be influenced by sinister, improper, or unworthy motives in the passage of any law, is, I think, utterly inadmissible, as a correct basis of judicial action. When we speak of their power, we are to do so, as said by Chief Justice Parker, “presuming that it will never be exercised but for wise or necessary purposes:” *Portland Bank v. Apthorp*, 12 Mass. 252. We do not sit here to review the manner in which the legislature has exercised its discretion, but to declare when it has plainly transcended its constitutional powers. The guaranty for just, wise, and wholesome legislation is to be sought in the intelligence and integrity of the members composing the legislative body, and in their immediate responsibility to their constituents.

It remains to consider the ground taken for the first time in the argument here, that in point of fact there was no law in existence at the time of the levy of this tax which authorized or required it to be made. There is no suggestion of this kind in the bill, and if it were true, the sheriff in thus acting without any authority would be a trespasser and liable to the action of the aggrieved party for damages. As, however, the case has been *bona fide* instituted and brought up to this court upon the constitutional question, it may not be improper to decide this question also, and thus put an end to the litigation between these parties.

This tax was declared by the code, chapter 35, and made a part of the permanent system of taxation. By chapter 40, the rates of assessment on the different subjects of taxation are fixed and prescribed. The code took effect on the first of July, 1850, and at the following session of the legislature no tax bill was passed, and that of the code remained in full operation. At the session in 1852, a temporary bill was passed fixing the rates of taxation for one year, and this tax was rated at two *per centum* of the estate transmitted. By this act, chapter 40, and section 1 of chapter 39, of the code, were repealed. At the session of 1852–3 a general tax bill was passed, which, unlike

that of the session of 1852, was not limited in its operation to any year or years. By this act, the tax upon this subject was fixed at the same rate of two *per centum* of the value of the estate, and chapter 40 of the code was again repealed, as was also the first section of chapter 39. At the session of 1853—4 the same tax was repeated, and the same chapter and section of the code were again repealed. In the act passed at the session of 1855—6 no rate is fixed for this tax. Why it was omitted, whether by inadvertence or design, we are not informed. But although by the act entitled "An act concerning the assessment and collection of the public revenue," passed April 7, 1853, and by the several acts above recited, various chapters and sections of the code on the subject of taxation are expressly repealed, yet nowhere is there found any clause repealing the tenth and forty-second sections of chapter 35, or either of the sections from the sixth to the twelfth, inclusive, of chapter 39, which are the sections imposing the tax in question. And the act of the seventh of April, 1853, distinctly recognizes those sections as permanent provisions of the revenue laws of the commonwealth.

Now, the testator died in June, 1855, and the tax immediately thereon accrued to the commonwealth, although the collection could not be enforced until the following year, and it was the duty of the sheriff to proceed to collect it in 1856, according to the rate prescribed by the act of March 2, 1854, notwithstanding the legislature had omitted to fix any rate in the tax law of March 18, 1856. The failure of the legislature to fix a rate in 1856, without any repeal of the previous laws prescribing the tax and fixing its rate, could not operate as a release of the tax accrued in 1855. The provisions of the code and of the act of March 2, 1854, are permanent provisions, and must remain in force until they are expressly repealed or replaced by other provisions plainly intended to be substituted in their stead. The mere omission to fix a rate upon a particular subject will not operate as a repeal of previous laws prescribing the tax, but it will be left still in force at the rate prescribed by the previous law, if there are no expressions showing clearly that the legislature intended the tax to be discontinued. And if the testator had died in 1856 instead of 1855, I incline to think that the tax would have accrued, and should be collected according to the rate prescribed by the act of 1854; though upon this point it is perhaps unnecessary to express an opinion.

I think the circuit court did not err in dissolving the injunction, and am of opinion that the order be affirmed.

ALLEN, P., and SAMUELS, J., concurred in the opinion of LEE, J.

DANIEL and MONCURE, JJ., dissented.

Decree affirmed.

INJUNCTION AGAINST COLLECTION OF TAX, whether will lie: *McCoy v. Chil-Boothe*, 17 Am. Dec. 607, note to *De Witt v. Hays*, 56 Id. 355, collecting other cases.

POWER OF TAXATION IN LEGISLATURE, under a constitution providing that taxes shall be equal and uniform: *People v. Coleman*, 60 Am. Dec. 581, and note 595; and that power of taxation and the manner of exercising it belongs to the legislature, see *Williams v. Cammack*, 61 Id. 508, and note 519. This power necessarily carries with it that to determine the extent and upon what property the tax should be levied: *Hill v. Higdon*, 67 Id. 289, and note 296.

LATER STATUTE WHICH DOES NOT IN TERMS repeal earlier one on the same subject is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject-matter: *Dugan v. Gittings*, 43 Am. Dec. 306; *Warder v. Arell*, 1 Id. 488; *Wyman v. Campbell*, 31 Id. 676; *Neill v. Keese*, 51 Id. 746; *Wright v. State*, 61 Id. 90.

EQUITY HAS JURISDICTION TO ENJOIN ILLEGAL ACTS of an officer attempted to be done *colore officii*, and also to enjoin action under an invalid requirement: *Blanton v. Southern Fertilizing Co.*, 77 Va. 337; *S. V. R. R. Co. v. Supervisors*, 78 Id. 276, both citing the principal case, which is cited on the last section of syllabus, *supra*, in *Fox's Adm'r v. Commonwealth*, 16 Gratt. 3, and *City of Richmond v. Gresham*, 76 Va. 940.

TO DECLARE LEGISLATIVE ENACTMENT VOID is the exercise of a judicial function of the most delicate character, never to be done except upon the clearest conviction of the unconstitutionality of the law: *Helfrick's Case*, 29 Gratt. 847; *Bridges v. Shallcross*, 6 W. Va. 570; *Commonwealth v. Byrne*, 20 Gratt. 175; *Slack v. Jacob*, 8 W. Va. 627; and the legislature possesses the full, absolute, supreme power of taxation, except so far as it may have been surrendered to the general government or may be interdicted by the restrictions and mandates of the state constitution, which is not to be consulted as to the powers given, but only as to limitations imposed: *Helfrick's Case*, 29 Gratt. 848; *Commonwealth v. Moore*, 25 Id. 955; *Peters v. Lynchburg*, 76 Va. 932; but exact justice and equality are not attainable in matters of taxation, and consequently not required: *Ould v. Richmond*, 23 Gratt. 473; and the most that can be done is to approximate them as near as possible: *Helfrick's Case*, 29 Id. 850; *Commonwealth v. Moore*, 25 Id. 958, all citing the principal case.

TAX IMPOSED UPON TRANSMISSION OF ESTATES, by devise or descent, to collateral kindred is not a tax on property: *Miller v. Commonwealth*, 27 Gratt. 116; *Schoolfield's Ex'r v. Lynchburg*, 78 Va. 371; *Peters v. Lynchburg*, 76 Id. 928-930, all citing the principal case.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN

MARSHALL v. AMERICAN EXPRESS COMPANY.

[7 WISCONSIN, 1.]

PARTY HOLDING AFFIRMATIVE OF ISSUE HAS RIGHT TO OPEN AND CLOSE the argument to the jury. The strict rule on this subject is for the party holding the affirmative to open his case, stating and maintaining his several points by reference to such evidence as tends to sustain them, together with the points of law and a reference to the authorities; then for the other side to answer, and illustrate and establish his defense, combating the positions assumed by his adversary, and assuming others of his own; and afterward for the party holding the affirmative simply to reply to what has been said on the other side, confining himself strictly in his reply to what has been urged by his opponent. But this rule is not always observed in practice, and a departure from it can hardly be assigned for error. Matters of this kind are generally under the control of the judge, and rest mainly in his sound discretion, and unless it is clear that he has abused that discretion, the fact that he may have made a mistake affords no ground for reversing the judgment.

RECEIVING LETTERS AND PACKAGES BY BANK IS NOT PART OF ITS ORDINARY BANKING BUSINESS which is to be done over its counter within what are termed "banking hours," but is a description of business that is usually done after the general business with the public is closed for the day.

EVIDENCE OF HABIT AND CUSTOM OF BANK TO RECEIVE PACKAGES after usual banking hours, and before the final closing of the bank building for the day, is properly admitted, for the purpose of enabling the jury to determine whether or not a tender of a package to the bank, by a common carrier, was made at a proper time, where the action is brought by the consignor of such package against the carrier to recover for its loss, and the latter defends on the ground that he offered to deliver the package to the bank, which refused to receive the same.

BANKING-HOUSE MAY PRESCRIBE REASONABLE RULES AND HOURS OF BUSINESS, within which its peculiar business with the public shall be done;

but the reception or delivery of packages is not a matter peculiar to the banking business, and a bank has no right to declare that it will not receive packages from a common carrier after what it pleases to call "banking hours," and thereby thrust upon him a further continuance of his extraordinary responsibility.

COMMON CARRIER CONTRACTS TO CARRY GOODS ENTRUSTED TO HIM, and deliver them to the consignee, at the proper time and at the proper place, without loss or failure, except by the act of God or of the public enemy. And the consignor at the same time undertakes that there shall be a consignee, or some proper person, at the proper place, at the proper time, to receive the goods, or in default thereof, upon due notice, the liability of the carrier as such ceases.

WHERE COMMON CARRIER DELIVERS GOODS, OR OFFERS TO DELIVER THEM, to the proper person, at the proper place, his liability as a common carrier is, from that moment, at an end, and the consignee has no power to prolong that liability, however inconvenient it may be for him to receive the goods.

OFFER BY EXPRESS COMPANY TO DELIVER PACKAGES TO BANK AT HALF-PAST FIVE o'clock in the afternoon, at the city of Madison, in the month of August, before the closing of the bank building for the day, constitutes a tender equivalent to a delivery.

BANK IS NOT EXCUSED FOR REFUSING TO RECEIVE PACKAGE from common carrier offering to deliver the same, by reason of the fact that the offer is made after banking hours, and that the vaults are locked and the cashier is gone home with the keys thereof.

OFFER BY COMMON CARRIER TO DELIVER PACKAGES TO OFFICER OF CORPORATION to whom he usually delivered such packages in the usual course of business is sufficient to discharge the carrier from his liability as such. Where, therefore, the messenger of an express company takes a package consigned to a bank to the banking-house, and there tenders it to the teller of the bank who usually received such packages from the company, such tender relieves the express company from further liability as a common carrier.

COMMON CARRIER, AFTER HE MAKES PROPER TENDER OF GOODS TO CONSIGNER, who refuses to receive them, holds them simply as a mandatary, and is then liable only for gross negligence.

CHARGE TO JURY THAT "GROSS NEGLIGENCE WAS SUCH WANT OF CARE as almost evinces a fraud, and such a degree of negligence as would rather invite depredation upon property than tend to protect it," although perhaps too strong in its language, can hardly be considered error.

AUTHORITY OF TELLER OF BANK TO RECEIVE PACKAGES CONIGNED TO IT may be inferred from the nature and character of his office. The reception of such packages pertains as much to the appropriate functions of the teller as to those of the cashier.

APPEAL from the Milwaukee circuit court. The action was brought by the appellants against the respondents, as common carriers, to recover the value of certain packages of money or treasure, amounting to eight thousand dollars, which the plaintiffs delivered to the defendants, as common carriers, at Milwaukee, to be carried and delivered to the State Bank at

Madison. There was a verdict for the defendants, and the plaintiffs appealed. The other facts are sufficiently stated in the opinion.

Butler and Butrick, for the appellants.

E. G. Ryan and William P. Lynde, for the respondents.

By Court, SMITH, J. The first error complained of by the appellants is the direction of the court below in giving the affirmative of the issue to the respondents. It is contended that inasmuch as the ruling gave to the defendants the right to open and close the argument to the jury, they thereby derived and enjoyed an advantage to which they were not by law and the practice of the court entitled. It is further contended that such error (if error) is sufficient cause for reversal of the judgment, and that it should be reversed for that cause alone.

It is undoubtedly true that the general practice of the courts of this country is for the party holding the affirmative of the issue to open and close the argument to the jury; and so general is it that the affirmative falls to the plaintiff, that a question of practice seldom arises therefrom. But if we should hold every departure from the strict common-law rule in respect to the order of argument to the jury as a ground of error, and fatal to the judgment, it is feared that appeals and writs of error would be fearfully multiplied.

The strict rule on this subject in our courts is supposed to be for the plaintiff (or party holding the affirmative of the issue) to open his cause, stating and maintaining his several points by reference to such evidence as tends to sustain them, together with the points of law and a reference to the authorities; then for the defendant to answer the plaintiff, and illustrate and establish his defense, combating the positions assumed by the plaintiff, and assuming others of his own, and afterward for the plaintiff simply to reply to what the defendant has said; and in this reply he is confined strictly to the matters urged by the defendant. I have used the terms "plaintiff" and "defendant" here for the sake of convenience, but the rule applies equally to whichever party has the affirmative, and *e converso*. But this rule is not always, if indeed often it be observed and enforced. Nothing is more common than for the counsel for the plaintiff to reserve the great portion of his remarks for his closing speech; of what is also of frequent occurrence, one counsel will open the case for the

plaintiff, and another counsel close by an entirely different course of argument. This may be loose or even bad practice, but it can hardly be assigned for error. Matters of this nature are generally under the control of the judge, and rest mainly in his sound discretion. Sometimes the privilege of the closing argument may be of important advantage, and a judge may so outrage the well-established order of proceedings as seriously to affect the rights of the parties. In a clear case of such kind, there is no doubt of the power of an appellate court to correct the evil. But such is not this case. It is a matter of some doubt under the pleadings which party had assumed the burden of establishing an affirmative state of facts. It seems that the counsel and court were in doubt, insomuch that both positions were respectively assumed in the course of the trial. We cannot say that there was an abuse of discretion in deciding either way in a matter so doubtful and uncertain; and whether the judge erred or not, it was altogether immaterial, and affords no ground for reversal of the judgment, in view of the state of the case presented by the record.

The other errors complained of are founded upon the instructions given to the jury on the trial in the court below. Some exceptions were taken to the ruling of the court in regard to the admission of evidence, but as no point is made upon them in the briefs of counsel, and as they were not argued at bar, it is presumed they are not relied upon here. We will therefore proceed to the consideration of the important principles of law involved in the case—principles by no means new, but to be applied to a somewhat novel state of facts.

Within the last few years there has grown up in this country a new, extensive, and important branch of business, intimately connected with commercial and financial transactions, involving at the present day trusts of immense magnitude, with corresponding liabilities, risks, and responsibilities. This business consists in carrying packages of money, gold, and jewels, and the lighter but more valuable articles of merchandise, from place to place, throughout the whole country. The defendants in this case are members of a joint-stock company, doing the business before mentioned, and known as the American Express Company. Vast amounts in value pass through their hands daily for the sake of dispatch and safety, regularity in transmission, and punctuality and promptness in delivery. Hence it is important to understand the nature and extent of their duties and liabilities, as prescribed by law in every stage

of their transactions, from the time of reception to that of delivery of the money or goods committed to their charge.

In this case, it is admitted that the plaintiffs, on the eighth day of September, 1857, at Milwaukee, delivered to the defendants a package or packages, one or more, containing some eight thousand dollars (or nearly that sum), to be carried and delivered to the State Bank in the city of Madison; that the package was received by the defendants in the capacity of common carriers, to be conveyed to the consignee aforesaid for a certain fee, or reward. It is also admitted that the packages were not received by the State Bank; but it is contended by the defendants that they did what was in law equivalent to a delivery of the packages, and were hence discharged from their liability as such carriers. On the contrary, it is claimed by the plaintiffs that the packages were never tendered or delivered to the consignee, but were lost while in the custody of the defendants as such carriers, and hence they are responsible for their value.

The facts in the case are by no means complicated, and in the main are undisputed. It appears that the defendants usually carried express matter of this kind in charge of a special agent on the train of passenger-cars between Milwaukee and Madison, and that during the months of August and September the train usually arrived at the latter place between four and five o'clock in the afternoon. The packages were taken to the office of the express company on the arrival of the cars, and were sent thence, at from five to half-past five o'clock P. M., to the State Bank by the messenger usually employed to distribute and deliver express packages, who was told by the teller of the bank that if he had any matter for the bank he would have to keep it until morning, for the vault was locked up and the cashier had gone with the keys. The packages were taken back by the messenger to the office of the express company, where they were locked up in their safe, and during the night the safe was opened and the packages with their contents were stolen.

There is some slight discrepancy between the testimony of Hill, the teller of the bank, and Memhardt, the distributing and delivering agent of the express company. But these discrepancies are regarded as of little moment, and as in no degree affecting the principles of law applicable to the case, and by which the rights of the parties involved must be determined.

The questions necessary to be considered arise out of the

instructions of the court below to the jury on the trial of the cause. These were in the form of specific instructions given at the request of the parties, to which exceptions were taken, and the general charge founded upon the entire case, as disclosed by the evidence.

The bill of exceptions contains exceptions taken to these specific instructions, which are set out in detail, and also to the general charge set out at length, to which is subjoined the following: "To which said charge, and to every part thereof, the plaintiffs by their counsel excepted."

We shall therefore consider these instructions severally, as they become important, and also the general charge, in which the specific points are also noticed, as they are modified, explained, and applied to the whole case presented by the evidence.

It is contended by the appellants that the circuit judge erred in giving the following instruction to the jury, viz.: "That if it had been the habit of the business between the defendants and the State Bank to receive packages of money received in Madison by the afternoon express from Milwaukee, after banking hours, and before the final closing of the bank building for the day, that custom authorized the defendants to deliver the packages to the bank, on the day of the receipt thereof after banking hours, and before the bank building had finally closed for the day."

Objections were taken to the expression used by the judge, "habit of business" and "custom," as being so unqualified and indefinite as to mislead the jury in their determination as to what is necessary to constitute such a usage or custom as would affect the liabilities or rights of the parties. We do not understand the judge as intimating, by the terms so used by him, a custom or usage such as would modify, change, alter, or control the common-law rule applicable to the relations of the parties, by which the jury would be bound, but as merely directing the minds of the jury to the situation of the parties, their mode of doing business of the kind under consideration, in regard to the particular time and place, in respect of which no absolute rule of law obtained.

This was an important feature in the case, and we think the judge was right in the view which he presented for the consideration of the jury. It was not the intention of the judge to instruct the jury in regard to a custom of the bank and others, which was to be adjudged as law, but as to a mode of doing business of the kind, in which the parties had acquiesced, and

on which they had a right to depend. It was claimed, on the one hand, that the defendants were bound by their contract to deliver the packages to the State Bank within "banking hours." There was some slight proof in the case that what were called "banking hours" were between nine A. M. and four o'clock P. M.; that at the hour of four o'clock P. M. the bank ceased to do the ordinary banking business over its counter. But the receiving of letters, messages, dispatches, and packages, though pertaining to the usual and necessary business of banking-houses, are not of that character. This latter description of business is usually done after its general and promiscuous business with the public at large over its counter is closed for the day. It was therefore very proper for the parties to prove, and the jury to consider, the usual mode of doing the particular business in question (that of receiving and forwarding packages by express), in reference to the time of the arrival and departure of the trains with which the parties, consignors, consignees, and carriers in this case are shown to be familiar. Because notes due the bank on a particular day must be paid before the usual hour of closing the bank on that day, it by no means follows that a mechanic making repairs on its building must quit work at that hour, or that he must present his bill within the prescribed periods. It is difficult to conceive how it is possible to fix the same hour for closing the ordinary banking business of the day, and for the reception and transmission of messages, adjusting of balances, and making remittances, etc. It does not follow that the vaults of the bank are necessarily closed because the hour for doing business over the counter has transpired. Nor are persons who have a right to transmit messages or packages to the bank answerable if they chance to be so closed. Therefore, if it had been the habit of the bank to receive packages from the parties, and of the kind in question, on the arrival of the train after the hour of four o'clock P. M., it was very proper for the jury to consider that fact in reference to the question whether the packages were tendered within a reasonable and proper time. The reception or delivery of packages is not a matter peculiar to the banking business; and the State Bank at Madison had no more right to declare or insist that it would receive no packages after what it pleases to call "banking hours" than has any merchant, warehouseman, or wharfinger a right to decline the reception of a valuable package of goods after a certain hour, and in that manner thrust upon the carrier a further continuance of his extraordinary responsibility. It would doubtless

be very convenient to consignees if they were permitted to prescribe rules of delivery, from time to time, as their own convenience should suggest. But such is not the law. It is true that it is competent for banking-houses, private as well as corporate, to establish rules of business and to prescribe the times within which its peculiar business with the public shall be done. But this power is not an absolute or arbitrary one. The rules prescribed and the hours of business designated must be reasonable and adapted to the exigencies of the peculiar kind of business, in reference to which they are established, as well for the safety and convenience of the public as for that of the bank. While it is proper and necessary, for the general convenience of all parties, that certain hours shall be named within which the bank will receive deposits, pay bills and drafts, discount notes, etc., it is neither reasonable nor proper that the same hours shall be designated for the transaction of its other business.

The contract of the defendants with the plaintiffs was that they would carry the packages in question from Milwaukee to Madison, and deliver them to the consignee (the State Bank) at the proper time, and at the proper place, without loss or failure, except by the act of God or the public enemy; the plaintiffs at the same time undertake that the consignee, or some proper person on his behalf, should be at the proper place, at the proper time, to receive the packages, or in default of which upon due notice, the liability of the defendants as such carriers should cease.

It is not denied that a delivery or tender of the packages at five o'clock P. M. would have been good in case of a merchant, hotel-keeper, or grocer, because that is an hour at which all ordinary business men in Madison are at their places of business. But it is contended that as the consignee in this case was a banker, the defendants were bound by their contract to make their delivery within the usual banking hours. The receiving of packages sent by express is not a business peculiar to banks, nor is it any part of a banking business, any more than the conduct of correspondence, which pertains alike to all kinds of mercantile business. Hence, there is nothing in the terms of the contract, expressed or implied, which rendered it obligatory on the defendants to deliver within "banking hours." It was, therefore, a fit matter of inquiry for the jury to ascertain, by proof of what was a proper time, under all the circumstances, to deliver the packages. And we think this matter was properly submitted to the jury. As there was nothing in the con-

tract, express or implied, designating the hours within which these packages were to be delivered, it certainly was eminently proper to admit testimony in regard to the habit of business between these parties, carriers, consignors, and consignee, as to the time of receiving such packages. The proof shows numerous instances in which the bank had received like packages from the plaintiffs after four o'clock P. M., without objection or remonstrance from any one, and it would be the height of injustice to allow the consignors and consignees to reap the advantages of a prompt delivery of packages of treasure on the arrival of the train, and then repudiate such practice when misadventure should suggest.

This is not all. The responsibility of common carriers is an extraordinary one. It is rightfully and wisely so. They are made by the law insurers of the property so committed to their charge against all loss or damage except such as results from the act of God or the public enemy. I would not lessen it one tittle if I could. The law imposes this extraordinary liability on account of the great trust and confidence necessarily reposed in the carrier, and of his absolute control of the property in transition. But the reason for this rule of law ceases when the carrier has tendered the property to the consignee, and put it in the power of the latter to take possession of it. And it would be extremely unjust to leave it in the power of the consignee to prolong this extraordinary responsibility upon the carrier so long as his convenience or caprice might suggest. If the carrier delivers or offers to deliver the goods or property at the proper time, at the proper place, and to the proper person, his liability as a common carrier from that moment is at an end, and it is not in the power of the consignee to prolong that liability, however inconvenient it may be for him to receive the goods. Other duties with corresponding liabilities may be assumed by the carrier, owing to the neglect or refusal of the consignee to receive the consignment, but these are commensurate only with the new trusts devolving upon the new relation, and which are widely different from those of a common carrier. It was therefore proper, inasmuch as the contract did not specifically express the time and hour of delivery, for the jury to find them as matter of fact, considering not only the relations of the parties, the time of the arrival of the trains, but also the habit of business between these same several parties. We cannot, therefore, perceive any error in the ruling of the judge in this respect, but on the contrary, deem it eminently

called for under the facts and circumstances of the case. To hold that the consignee could prolong the extraordinary liability of the defendants as common carriers after the time when they tendered a delivery of the packages, according to their usual course of commerce in that behalf, would be to hold that because the consignee was a bank, the defendants, as common carriers, were bound to know its usual hours for the transaction of general banking business, and contracted to perform their duties as carriers in reference to such hours, notwithstanding any course or habit of transacting such business which had theretofore obtained between the several parties concerned in this case. And such we understand to be the doctrine contended for by the counsel for the plaintiffs; viz., that the contract between the plaintiffs and defendants "would require a delivery to the State Bank in the time and manner established by the general usage and custom of banking, or in other words, within banking hours, and upon the counter of the bank, while open for business with the public."

We have already sufficiently commented upon this point. We will barely repeat that the delivery of express matter, and the like, that is, the transfer and delivery of packages of treasure, the exchange of balances by messengers, the sending off of like packages, and the reception thereof, by express, upon the railroad trains, can hardly be considered as business which must necessarily be done "within banking hours, and upon the counter of the bank, while open for business with the public." At all events, if it be so, it is not so notorious, so universal, so well and so long established, as to enter into and become a part of the contract, in such cases, by implication of law, but should be left to the consideration of the jury, under all the circumstances of the particular case, as was done by the court on the trial below.

We have therefore considered the question as to the time of the delivery or offer to deliver the packages by the defendants, and we are of the opinion that the instructions of the circuit judge to the jury on this point were correct. The delivery of packages of treasure sent by the express company as a common carrier does not come within that class of general banking business required by general usage to be done over the counter within the usual hours of transacting the ordinary business of the bank with the public.

It is also proper to observe that there is not the slightest proof that this kind of business had been done, or required to

be done, within any particular hours. On the contrary, the evidence establishes beyond a doubt that it was the uniform custom of the bank to receive packages of this kind as soon after arrival of the train of cars as it was convenient to deliver them. Indeed, it appears that a part of the message, viz., the letter accompanying the package, was received by the agents or servants of the bank, on the very occasion when the packages were offered, and that the only reason given for not receiving the packages was, that the cashier was gone, and had with him the keys of the vault, which was locked up. Of this latter circumstance we shall speak hereafter.

We have carefully examined the authorities cited by the appellants to this point, but they do not seem to apply to the state of facts presented by this case.

The next question presented by the case is, Did the court below properly instruct the jury as to the proper place for the delivery of the packages? And on this point it is understood that all parties are agreed that the banking-house of the consignee was the proper place.

The next question presented for our consideration is, Were the instructions of the judge to the jury on the trial below correct, in relation to the person to whom the packages were tendered, or in other words, offered to be delivered?

The portion of the charge of the court below specifically noted in the bill of exceptions as exceptionable, and to which exceptions were taken, is set forth as follows: "That if on the messenger's [of the express company] appearing at the bank at half-past five P. M., the teller having reason to anticipate an offer of delivery of express matter to the bank, said, 'If the messenger had anything for the bank he would have to take it back and keep it until morning, for the reason that the cashier was gone with the keys, and the vaults were closed and locked,' I am inclined to think these facts would amount to a tender."

This instruction, it is contended by counsel for the plaintiffs, is erroneous, for the following reasons:

1. "Because it assumes the fact that the teller, Hill, had authority to receive the packages in question after banking hours, which fact it was material for the jury to find."

2. "Because it assumes the fact that a delivery 'at half-past five P. M.' to the teller, after the vaults were closed and the cashier had gone away with the keys, was according to the established usage between the bank and the express company."

3. "Because it is the law that a bank teller has no authority

to transact business of this character in or out of banking hours for the bank, and no particular custom between the bank and the defendants could affect the plaintiffs without notice."

The first and second objections to this instruction may be considered together, and it is sufficient to remark that the matter of "banking hours" has been sufficiently commented upon. There was no express contract to deliver before four P. M., and no custom was proved on the part of the express company to deliver, or that of the bank to receive, before four P. M., and not after. In the absence of such evidence, it certainly was not proper to assume half-past five P. M., at that season of the year in Madison, to be a proper time to deliver packages sent by express. And further, that if the delivery, or rather offer of delivery, was within proper time, it mattered not to the defendants whether the vaults were locked up or not. The proof shows that the cashier and the keys were not far off, and could have been procured within a very short time. The letter accompanying the packages was actually delivered, and came to the possession of the cashier very soon after the tender of the packages. If the delivery was in time, it was not the duty of the express company to procure the keys and place the treasure in the vaults of the bank. Their duty (as to time) was discharged.

We do not think that the objection to the charge of the judge, that it assumes the authority of Hill, the teller, to receive after half-past five P. M., is well taken. In the general charge the judge says: "Here the consignee was a corporation, intangible and ideal, which can only operate by its agents, and delivery must be necessarily made to such agents. Delivery to a proper agent of a bank or other corporation is the same as delivery to a natural person's hands, where the consignee is a natural person. If the defendants sent their ordinary agent in that behalf to the State Bank to deliver the packages, and he went there with these packages, and there tendered them to the officer to whom he usually delivers such packages, according to the usual course of business between the defendants and the bank, that discharges the defendants from their liability as common carriers." Here is no assumption of any fact, but the character and authority of the person to whom the tender of the packages was made are distinctly left to the jury. In other portions of the general charge these same facts are distinctly left to the jury to find from the evidence submitted.

But the third ground of exception to this portion of the

judge's charge is the most important to be considered, and the one upon which (the question of time excepted) the plaintiffs seem most confidently to rely. This requires us to determine who was the proper officer or agent of the State Bank to receive the packages in question, and to whom the defendants could, at the proper time, tender them in discharge of their liabilities as common carriers.

The bank, being a corporation, must act through personal agencies who represent its powers. These agencies are designated and endowed by the proper corporate authority, the evidence of which appears either by the published will of the corporate authority, or by the acts of the agents, ratified and confirmed by such authority. The degree of power lawfully exercised by an agent is not necessarily measured or limited by the name given to his agency. It depends upon the will of that body in which the corporate powers are centered, and is a question of fact, and not conclusion of law.

It is contended here by the appellants that the teller of the State Bank, Hill, had no authority to transact business of this character, either in or out of banking hours, and that no peculiar custom between the bank and the defendants, without notice, could affect the plaintiffs; and to this point several authorities are cited.

In the case of *Salem Bank v. Gloucester Bank*, 17 Mass. 1 [9 Am. Dec. 111], a large number of bills, in sheets, of the Gloucester Bank had been filled up and signed by the cashier, but the president of the bank died previous to affixing his signature. The sheets were laid away in a desk on account of the dampness of the vault. Some three years after, the desk was opened by false keys, the sheets stolen, the signature of the late president forged to the bills, which were put into circulation, and a large amount of them came to the possession of the Salem Bank in the usual course of business. The Gloucester Bank having refused payment of the bills, the Salem Bank brought suit to recover the amount. The plaintiff contended, among other things, that the defendant was liable, on the ground of the carelessness and negligence of their agent, the cashier, in keeping the bills so signed by him in such an improper manner and place that they afterwards came into circulation, and the plaintiffs injured in consequence; and also that as the bills got into circulation through the carelessness of the officers of the bank, they ought to be considered the notes of the bank, although the name of the president was

feloniously put to them by some person into whose hands they fell. But it was held that the signature of the president was essential to the bills, and the consequences of the negligence and mismanagement of the officers in keeping the bills in the manner stated were too indirect and remote to render the corporation liable.

This case may possibly have some remote bearing upon the case at bar, but it is not easy to perceive its force. It decides that corporations are not answerable for the negligence of their servants, unless acting within the scope of their authority. This is admitted. If Hill, the teller of the State Bank, had no authority to receive the packages, his refusal to receive them would have no bearing upon the rights of any one. But that is the very question to be tried. The contract of the defendants required them to deliver the packages to the State Bank, and unless they offered to deliver them to some person (no matter whether an officer of the bank or not) authorized to receive them, if such person was there to be found, they are not discharged of their liability. They did not agree to deliver the packages to the president, the cashier, the teller, or the bookkeeper of the bank, nor within the vaults of the bank, but to the State Bank, that is, to some natural person authorized to receive them, if such person was present. The question returns, Did the State Bank authorize any person to receive these and the like packages of the defendants? and was Hill such person? If Hill was so authorized, the charge of the court below was correct. Whether he was so or not, depended upon the facts and circumstances as they appeared in evidence.

In the case of *Mussey v. Eagle Bank*, 9 Met. 306, the suit was brought by the plaintiff to recover of the defendant the amount of a check for four thousand dollars drawn by George F. Cook & Co., payable to said Cook & Co. or bearer, on which the following words were written by the defendant's teller: "Good. H. B. Odiorne, Teller." It appeared that Cook & Co. had no funds in the defendant's hands, payment was refused, and the check was protested. It also appeared that Odiorne, the defendant's teller, had been in the habit of certifying that checks drawn on the defendants by Cook & Co. were "good," and that such checks had been received as cash at different banks, as well as by individuals.

The defendants gave in evidence an article of their by-laws, in which the duties and powers of the teller are explicitly defined, and from which not only authority was given or could be inferred to the teller so to certify checks, but limitations

and restrictions of his powers and duties are expressed, clearly incompatible with any such authority.

But it was insisted that the continued practice or custom of the teller to certify such checks in the manner indicated, and in one or more instances with the knowledge of some of the superior officers of the bank, rendered the defendant liable on the ground of usage, although the teller had no express power so to certify.

The court held that the teller had no authority by virtue of the nature of his office or the regulations of the bank to certify checks in such manner, and that such a custom or usage, if proved, could not avail the plaintiff, as it would be bad in law, and could not be upheld; that it would be against public policy, vicious in its tendency, opening up a way for the practice of numerous frauds, and hence could not receive the sanction of the courts.

Such are the grounds on which the court decided the case of *Mussey v. Eagle Bank*, 9 Met. 306, but they do not apply in principle or analogy to the case under consideration. The doctrine of this case is at variance with the usual mode of business transactions in this respect. It stands alone, and depends upon the particular facts of that case, and can hardly be considered authority at large, even upon the point decided, except as to the particular circumstance of that case, where the powers of the teller were expressly defined and restricted.

The case of *Fleckner v. Bank of United States*, 8 Wheat. 338, 5 Curt. 487, decides that the indorsement of a note by the cashier of a bank, to pass the title, is *prima facie* within the scope of his authority, and is valid, especially as in that case his act was ratified by a vote of the directors. The court says that generally the cashier is the chief executive officer of the bank in its usual daily transactions, and hence it is urged here that it was the duty of the defendants to deliver the packages to the cashier, who alone had authority to receive them. We do not think any such rule can be deduced from the principle of the case just cited. It may be proper to remark that the receiving of the packages of money by express is not peculiar to the banking business; there is nothing in it which requires the skill, judgment, and discretion of the chief financial officer, but may be intrusted to any one to whose fidelity their safe-keeping may be confided.

We may dismiss this point here, so far as the specific instruction to which it relates is concerned, with the remark that the

question as to who was the proper person authorized to receive the packages, and whether Hill was such person, were fairly submitted to the jury, upon which the jury have passed; which matter we shall again briefly consider on review of the ruling of the judge in refusing a new trial.

Another of the specific instructions to which exception was taken is in the following words: "That if upon an offer by the defendants to deliver the packages to the bank, the bank could, without serious inconvenience, have received and taken care of the packages, a refusal to receive them by the bank was in its own wrong, and on its own responsibility, whether such offer was within what are called 'banking hours,' or not."

There can be no substantial objection to this instruction when rightly construed. The contract of the defendants required them to deliver the packages to the State Bank, not to the cashier, president, or other officer thereof, wherever he might be found. The bank, although a corporation and intangible, yet, for the purposes of the contract in this case, had a local habitation, a place where its corporate functions were exercised, and where it might be held responsible for the discharge of its appropriate duties to the public, and to individuals having claims upon it. With reference to such place, the parties contracted. The defendants were bound to deliver the packages at that place, viz., the banking-house or office used by the corporators, and the bank was expected by the consignors to receive them. There, at that place, on delivery, or what was equivalent to delivery, the liability of the defendants as common carriers ceased. At that place, the bank, if it assumed or was ready and willing to assume the duties of consignee, was bound to receive the packages. Perhaps the use of the words "without serious inconvenience" by the judge was unnecessary, as the convenience or inconvenience of the bank might have nothing to do with the duties and obligations of the defendants. If so, the use of the phrase was in favor of the plaintiffs. Most certainly the extraordinary responsibility of the express carriers cannot be prolonged merely to suit the convenience of consignees, whether banks or individuals. We will not undertake to say what might have been the duty of the defendants in case the banking-house of the consignee had been on fire or in possession of a mob. That question does not arise, though even in such case it might be gravely considered whether the carrier, arriving at the place of consignment, and ready to deliver, may be required to continue longer his relation or responsibilities as such on

account of the misfortune or calamity of the consignee. This controversy is not between the State Bank and the defendants. The State Bank is not now on trial. The question is, Did the defendants fulfill their contract by delivering to the bank, or by doing what was equivalent in the law? They were not bound to furnish a consignee to receive the packages, nor to wait for the plaintiffs to provide one.

We have already said that we do not think the defendants' contract required them to deliver the packages within what are called "banking hours." This term has acquired a meaning among bankers and merchants, but it is by no means uniform. What are banking hours in some places are not in others. In the city of New York, banking hours are understood to be from ten o'clock A. M. to three o'clock P. M. In the city of Milwaukee, from nine A. M. till twelve and a half P. M., and from two till four P. M. All we know from the evidence in this case in regard to banking hours in Madison is from Mr. Hill, who says "banks at Madison close at four o'clock." But however the term may vary as to time, what is understood by "banking hours," in a technical sense, is the particular hours of the day within which the banks of a city or town transact the usual banking business with the public over the counter, such as discounting bills, receiving deposits, and paying checks, etc. It is reasonable and proper that there should be a uniform hour at which this kind of business should cease, in order to give the officers and agents of the bank an opportunity to write up the books, and adjust its balances for the day. When these banking hours are uniform and reasonable, the law will regard them, in respect to the purposes for which they are established. But these hours only have reference to the intercourse of the bank with the public at large, in relation to the exclusive business of banking. Business quite as important is always transacted after these hours have elapsed—balances with other banks to be ascertained, cash account brought up, and cash counted; and many other things which will suggest themselves to the banker, which are always done after "banking hours," even the very business of making up and transmitting packages, as well as receiving them; not only because it can be done more conveniently after the business with the public is closed, but because until such business is closed much of it could not be done. The convenience or inconvenience of the bank, whether serious or not, had nothing to do with the duties of the defendants as carriers. The particular hours within

which the bank usually did its every-day business over its counter with the public has nothing to do with the duties or liabilities of the defendants. The latter were bound to deliver at the earliest practicable moment.

The next instruction specifically excepted to by the plaintiffs is set out as follows: "That after an offer by the defendants to deliver and a refusal by the bank to receive, the defendants were in charge of the packages from thenceforth as mandataries only, and responsible for gross negligence only, and that the *onus* of proving such gross negligence lies on the plaintiffs."

It is assigned for error upon this point that the judge assumed that there was, in point of fact, an offer to deliver at a reasonable and proper time, and a refusal by the bank to receive the packages. But it is apparent that this is a mistaken view of this portion of the charge. It followed the general charge, and of course was qualified by the theory of the case presented by such general charge. It was not the duty of the judge, in ruling upon these specific points, to review in detail all that he had theretofore given in his instructions to the jury. The judge assumed nothing in this behalf, but left to the jury to find, from the evidence, whether there was an offer by the defendants to deliver, and a refusal by the bank to receive, the packages; and if the jury found such to be the facts, he was right in instructing the jury that the defendants afterwards were in charge of the packages as mandataries only, and were only liable for gross negligence.

It is not our intention to determine here whether, if the defendants have discharged their duty as common carriers, by an offer to deliver in the manner disclosed by the evidence, any further responsibility whatever remained upon the defendants. We will not here decide whether or not it was competent for Memhardt, the express messenger, after a tender of the packages, and a refusal to receive them by the consignee, to subject the defendants to a different, though less, degree of responsibility, by assuming for them the character and liability of mandataries, in lieu of those of common carriers. Admitting that the messenger could do so, and thus bind the defendants to a new and different contract of bailment, then the charge of the judge was as favorable to the plaintiffs as the case would warrant. The defendants, after discharging their duties as carriers, could only be held as mandataries and liable for gross negligence.

It should be recollected that common carriers do not neces-

early become warehousemen on failure of the consignee to receive the goods at the place of consignment. They may contract to do so, but it may well be doubted whether their mere delivering agent may be presumed, from the nature of his duties, to be authorized to assume that character for them. But it is clear that after the offer of delivery at the proper time and place, and to the proper person, by the defendants, the obligation of their contract was fulfilled, and the wages of their service in that behalf earned, and that any further service required or performed was outside of their contract, and without reward. Therefore, if responsible at all, they were responsible for gross negligence only. We do not see how it was possible for the jury to be misled by any alleged assumption of the judge, even without reference to his general charge. But when the whole charge is considered in this behalf, we think the plaintiffs have no reason to complain.

The next and last point to be considered (save the exception taken to the order of the judge refusing a new trial) is based upon the charge to the jury in relation to the liability of the defendants, upon the hypothesis that they have made a sufficient offer to deliver the packages, and their messenger had taken them back at the request of the consignee. On this point the judge charged the jury that in such case the defendants were liable for gross negligence only, and that "gross negligence was such a want of care as almost evinces a fraud, and such a degree of negligence as would rather invite depredation upon property than tend to protect it."

We do not think there is occasion for a very critical discussion of the definition of gross negligence given by the judge. He had, in the same sentence, told the jury that ordinary diligence is that which a prudent man would exercise about his own business; that the question of diligence was one for the jury, and depended upon the particular facts in each case; and then used the language, in relation to gross negligence, of which the plaintiffs complain.

The judge rightly remarked that it was difficult to lay down any general rule in regard to degrees of diligence. What would be ordinary diligence in respect to one subject, and in some circumstances, would fall short of that degree under other circumstances. And it is believed that the language of the judge in this case, though perhaps rather too strong, is not more liable to exception than that used by Lord Stowell, in the case of *Rendsberg*, when endeavoring to elucidate this subject.

"If," said he, "I send my servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss if his pocket were picked on the way. But if, instead of carrying with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property, so as to invite the snatch of any person he might meet in the crowded population of this town, he would be liable, because he would be guilty of the *neglencia malitiosa* in doing that from which the law must infer that he intended the event which has actually taken place:" 6 Rob. Adm. 142.

Language similar to this is met with everywhere in the books where gross negligence is treated of. Lord Holt says that it is a fraud upon the bailor for the bailee to be guilty of gross negligence by which the former suffers loss or injury. On the whole, we are unable to say that the judge erred in this instruction, but we are of the opinion that the question of diligence was fairly presented, and that all the facts and circumstances touching that point were fully submitted to the jury.

We have now considered all the points which we deem it necessary particularly to discuss, except the refusal of the judge to grant a new trial. On examining the motion as set out in the record, it appears to have been based exclusively upon the alleged errors of the judge in the instructions which he gave to the jury, most of which we have already considered, and hence it is only necessary to recapitulate by stating briefly the principles of law which we deem applicable to the case as the same is disclosed by the evidence.

We are of the opinion that the contract required the defendants to deliver the packages in question to the State Bank, at the banking-house in Madison, as soon as practicable after the arrival of the train; and that they were not confined to what are usually called "banking hours," but could deliver or tender them at any time of the day within the usual business hours of the place, and that if they did offer to deliver the packages to a proper officer or agent of the bank authorized to receive them, their liabilities as common carriers from that time ceased. In this case, the delivering agent of the defendants did gain access to the banking-office, and to all intents and purposes offer to deliver the packages to Mr. Hill, the teller, at from five to half-past five P. M. This we think sufficient as to time. That the usual "banking hours" adopted by the bank for the transaction of business with the public, over its counter, have not, and from the nature of the case cannot have, any relation

to the transmission or reception of express packages, and hence such banking hours could not have entered into the contemplation of the parties in entering into this contract. It is one among the principal inducements to the employment of express companies for the transmission of these packages that they shall have a speedy carriage and a prompt delivery.

But in this case, it is evident that such hours of the day were not considered by the parties as affecting their contract, from the fact that the train from the east arrived at Madison after four o'clock P. M., and that the parties had uniformly disregarded those hours, the one party delivering express matter immediately on the arrival of the train, and the other receiving it. On this occasion, Mr. Hill did not object to receiving the packages because it was after four o'clock P. M., but because Mr. Ellis, the cashier, had gone off with the keys to the vault, which was locked. The letter accompanying the package was actually received, and it would not have been a difficult matter to send to the residence of Mr. Ellis and obtain the keys. At all events, it was not in the power of the bank to prolong the extraordinary responsibility of the defendants for such reason, after the packages were tendered at its counter.

Further, we think Mr. Hill was a proper person to receive the packages on behalf of the bank. Although the judge left the question of his authority to the jury, to be inferred from all the circumstances of the case, yet we are of the opinion that the jury were warranted in inferring such authority from the character and nature of his office, and the judge might very properly so have instructed the jury. It cannot be possible that it is the duty of the agents of the express company to retain such packages until they can deliver them to the cashier only; if he is absent, to hunt him up; if out of town, to wait for his return; if the vaults are locked, to wait until they are opened by the hands of the cashier. The reception of such packages pertains as much, if not more, to the appropriate functions of the teller as to those of the cashier. In the case before us, however, there was abundant evidence, positive and uncontradicted, that Mr. Hill was directly authorized to receive these packages. He had been in the habit, on all occasions, of receiving and receipting for them, with the full knowledge and assent of the superior officers of the bank, at all times on presentation, whether within or out of banking hours. If he was the person so authorized by the consignee, it was wholly immaterial whether the plaintiffs had notice of

it or not. It was of no consequence to them who such person was, whether the cashier, the teller, or the porter. And most certainly the defendants are not to be affected by their want of notice. We do not wish to be understood as deciding, or intending to intimate, that it is the duty of the bank to keep its vaults and doors open, and persons in attendance for the reception of such packages, after the business of the day is entirely closed. That question is not before us. In this case the express messenger gained access to the counter of the bank, and a properly authorized agent was present to receive the packages.

If these views are correct, it follows as a necessary consequence that the defendants' duties as common carriers were discharged, and their liabilities as such at an end; and whatever may have been their character, as bailees, afterwards, we think they were certainly liable for gross negligence only, and if so, that matter was properly submitted to the jury.

We have been deeply impressed with the importance of this case, and have given to it all the consideration in our power, and have endeavored to discuss at length the facts and principles of law applicable to them, even at the risk of being tedious. Although the law of bailment in relation to common carriers is familiar, yet this case has presented some features somewhat novel in their character, in the consideration of which we have been but little aided by authority. We have, however, been greatly assisted by the masterly manner in which it was presented by the respective counsel engaged, and only regret that we have not been able to do justice to their arguments in the opinion here given.

The judgment of the circuit court must be affirmed, with costs.

COMMON CARRIERS ARE LIABLE FOR ALL DAMAGES happening to goods intrusted to them, from any cause except the act of God or of the public enemy: See *Cooper v. Berry*, 68 Am. Dec. 468, note 480, where other cases are collected.

WHAT CONSTITUTES DELIVERY BY COMMON CARRIER so as to exonerate him from further liability: See *Moses v. Boston & M. R. R.*, 64 Am. Dec. 381, note 392, where other cases are collected; *Chicago & R. I. R. R. Co. v. Warren*, 63 Id. 317, note 320.

USAGE OF BANKS: See note to *Governor v. Withers*, 50 Am. Dec. 97, where this subject is considered.

ERRORS NOT PREJUDICIAL ARE NOT GROUND FOR REVERSAL: See *Johnson v. Jennings*, 60 Am. Dec. 323, note 330, where other cases are collected.

LIABILITY OF BANK FOR ACTS OF ITS TELLER apparently within the scope of his authority: See *Farmers' etc. Bank v. Butchers' etc. Bank*, 99 Am. Dec. 678, note 691.

THE PRINCIPAL CASE IS CITED in the following cases to these points: A common carrier is not bound by his agent's knowledge or notice of facts outside of his legitimate duties and employment as such agent: *Wells v. American Ex. Co.*, 44 Wis. 349; the carrier's duty to deliver and the consignee's duty to receive are reciprocal, and both must be maintained: *Adams Ex. Co. v. Darnell*, 31 Ind. 23; unless parties had knowledge of a custom, or it had existed so long a time as to warrant the presumption that they had contracted with reference to it, evidence thereof is inadmissible: *Scott v. Whitney*, 41 Wis. 507; the order in which counsel is allowed to argue to the jury is no ground of error, unless injustice was caused thereby: *Austin v. Austin*, 45 Id. 532. But in the case of *Kaine v. Trustees of Omro*, 49 Id. 378, Taylor, J., referring to the principal case, said: "We are not inclined to extend the rule as laid down by this and other courts, 'that, in the absence of any positive rules upon the subject, the order of argument to the jury is matter of practice within the control of the trial judge, and an appellate court will not interfere unless there is a clear abuse of discretion, and there is good ground for believing that the party complaining has been injured by a wrong ruling as to such order.'"

O'MALLEY v. DORN.

[7 WISCONSIN, 233.]

ERROR CANNOT BE PRESUMED, BUT MUST AFFIRMATIVELY APPEAR, and where the refusal of the court to charge the jury as requested is assigned as error, and the evidence upon which the charge was asked is not before the appellate court, it will presume that the refusal was correct, and warranted by the evidence.

TRAVELER MAY NOT REMAIN STUBBORNLY AND DOGGEDLY UPON RIGHT OF TRAVELED PART OF HIGHWAY. and wantonly produce a collision which a slight change of position would have avoided. Persons meeting on highways owe to each other reciprocal duties, and are bound to use reasonable precautions to avoid collision.

ERROR to Dane circuit court. The opinion states the case.

S. Crawford, and Smith and Keyes, for the plaintiff in error.

Abbott and Clark, for the defendant in error.

By Court, SMITH, J. This is a case in error from the circuit court of Dane county, wherein Dorn, the defendant in error, commenced an action against the plaintiff in error to recover damages resulting from a collision in the highway, and in which the plaintiff below obtained judgment.

The case was tried at the June term, A. D. 1858. None of the evidence is brought up in the record, and the only question we are called upon to consider arises upon the following instruction asked by the defendant below, and refused, to wit:

"If the jury find that the defendant, at the time of the collision complained of, had driven his wagon to the right of the

middle of the traveled part of the highway, and that his wagon, at the time of such collision, was to the right of the middle of the traveled part of said highway, then he is not liable for the damages resulting therefrom."

Perhaps if the evidence which was given upon the trial was before us, we might perceive how a refusal to give the broad charge requested in this instruction may have misled the jury. But in the absence of all such evidence, we cannot say that such refusal was necessarily erroneous. The instruction implies that if the defendant had driven his wagon to the right of the middle of the traveled part of the highway, and his wagon was to the right at the time of collision, under no possible circumstances could he have been liable for any collision. Such is not the law. There are mutual and reciprocal duties incumbent upon those who travel the highways of the country, as there are upon those passing upon navigable streams. The law enacts a general rule by which the use of such highways shall be regulated, to avoid injuries, and to prescribe duties and fix liabilities. But while the statute prescribes a general rule, it does not undertake to define what may be the duties and liabilities of travelers under all possible circumstances. A man may not remain stubbornly and doggedly upon the right of the traveled part of the highway, and wantonly produce a collision which a slight change of position would have avoided. For aught that appears in this case, such may have probably been the state of things here. The legal presumptions are, that the evidence warranted the refusal of the court to grant the instruction. Error cannot be presumed. It must affirmatively appear. It is impossible for this court to say that the evidence did not show, and could not have shown, that the defendant below was clearly in the wrong; that the collision was brought about by his own contrivance; in other words, the refusal to instruct the jury may have been correct, and we are bound to presume that it was so: *Brooks v. Hart*, 14 N. H. 307; *Kennard v. Burton*, 25 Me. 39; *Earing v. Lansing*, 7 Wend. 185, and cases there cited.

The judgment is affirmed, with costs.

LAW OF ROAD.—In order to avoid collision and to secure travel upon highways from interruption, it is necessary that there should be some certain rule for travelers to follow when they meet or wish to pass each other. The rules which have been adopted for the purpose of securing the safety and convenience of persons meeting and passing each other upon highways constitute what is termed the law of the road: *Angell on Highways*, sec. 323.

IN UNITED STATES, the rules constituting the law of the road are: 1. When parties driving vehicles meet on a highway, it is the duty of each to seasonably bear or keep to the right: *Angell on Highways*, sec. 328; *Avegno v. Hart*, 25 La. Ann. 235; *Palmer v. Barker*, 11 Me. 338; *Wriann v. Jones*, 111 Mass. 360; *Daniels v. Clegg*, 28 Mich. 32; *Brooks v. Hart*, 14 N. H. 307; *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194. 2. A person who has the entire road before him free from carriages or other obstructions, and who has no notice that there is any one behind him desiring to pass, is at liberty to travel upon any part of the road that suits his pleasure or convenience, and no blame can be imputed to him for doing so: *Angell on Highways*, sec. 332; *Johnson v. Small*, 5 B. Mon. 25; *Palmer v. Barker*, 11 Me. 338; *Foster v. Goddard*, 40 Id. 64; *Dunham v. Rackliff*, 71 Id. 245; *Wriann v. Jones*, 111 Mass. 360; *Daniels v. Clegg*, 28 Mich. 32; *Brooks v. Hart*, 14 N. H. 307; *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194; *Bolton v. Colder*, 1 Watta, 360. The English rule on this subject seems to be the same as the American: *Aston v. Heaven*, 2 Esp. 533; *Pluckwell v. Wilson*, 2 Car. & P. 375. Tenney, C. J., delivering the opinion of the court in *Foster v. Goddard*, 40 Me. 66, discussing this subject, said: "A party having before him the entire road free from carriages or other obstructions, and having no notice of any carriage behind him, in season to stop, or to change his course or position, is at liberty to travel upon such parts of the way as suits his convenience or pleasure, and no blame can be imputed to him." 3. A person may pass on the left side of the road, or across it, for the purpose of turning up to a house, store, or other object, on that side of the road; but he must not interrupt or obstruct another lawfully passing on that side, and if he does, he acts at his peril, and must answer for the consequences of his violation of duty. In such a case he must pass before or wait until the person on that side of the way has passed on: *Palmer v. Barker*, 11 Me. 338; *Angell on Highways*, sec. 336; *Fales v. Dearborn*, 1 Pick. 345. 4. The American rule seems to be, that where two persons are traveling in the same direction, the foremost one is not bound to turn out for the other if there is room for the latter to pass on either side: *Bolton v. Colder*, 1 Watta, 360; *Angell on Highways*, sec. 340. If there is not enough room to pass, the foremost traveler should yield an equal share of the road, on request made, if that is practicable. But if it is not practicable, then they must defer passing until they reach more favorable ground. If the leading traveler then refuses to comply with the request to permit the other to pass him, he will be answerable for such refusal. Morgan, J., delivering the opinion of the court in *Avegno v. Hart*, 25 La. Ann. 236, said: "When a driver attempts to pass another on a public road he does so at his peril; at least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself." See also *Foster v. Goddard*, 40 Me. 64. The English rule on this subject is, that in passing, the foremost traveler must turn or bear to the left, and the other shall pass on the off side: *Angell on Highways*, sec. 328; *Wayde v. Carr*, 2 Dow. & Ry. 255; *Turley v. Thomas*, 2 Car. & P. 103. 5. A traveler on horseback meeting another horseman, or a vehicle, is not, in this country, required to turn out in any particular direction to avoid collision. All that is required of him is to exercise prudent care under the existing circumstances: *Angell on Highways*, sec. 331; *Dudley v. Bolles*, 24 Wend. 465. But in an early case in Vermont it was said to be a rule, sanctioned by common consent and immemorial usage, that a horseman should yield the traveled part of the road to a wagon: *Washburn v. Tracey*, 2 D. Chip. 128. In Pennsylvania, too, the rule

seems to be that a horseman cannot compel a teamster, having a heavy load, to turn out of the beaten track, if there is sufficient room to pass. And this principle is also applied as between light and heavy vehicles. It is the duty of the light vehicle to give way to the more unwieldy one: *Beach v. Parmeter*, 23 Pa. St. 196; *Grier v. Sampson*, 27 Id. 183. In England, the rule of the road as to keeping the proper side when passing applies to saddle-horses as well as to carriages. In passing, the carriage must keep its proper side, and so must the horse: *Angell on Highways*, sec. 328; *Turley v. Thomas*, 8 Car. & P. 103. These are the principal rules that go to make up the law of the road.

IN ENGLAND, the rule as to the passing of vehicles moving in opposite directions is the reverse of what it is in this country. There the rule is that in meeting each party shall bear or keep to the left: *Wayde v. Carr*, 2 Dow. & Ry. 255; *Angell on Highways*, sec. 328. The law of the road has generally been established by statutory enactment in the United States, but in England it has been established by custom: *Id.*, sec. 333. This difference in the origin of the rules constituting the law of the road in the respective countries will account for the difference in the stringency with which the courts of this country and of England enforce these rules. In the latter country, the rule requiring persons meeting with vehicles or horses to turn to the left is held not to be inflexible. Thus in *Pluckwell v. Wilson*, 5 Car. & P. 375, it was held that a person driving a carriage is not bound to keep on the regular side of the road; but if he does not, he must use more care and keep a better lookout to avoid concussion than would be necessary if he were on the proper part of the road. In *Turley v. Thomas*, 8 Id. 103, it was said that if the driver of a carriage sees a horseman coming furiously on its wrong side, it is the duty of the driver of the carriage to give way and avoid accident, although in so doing he goes a little on what would otherwise be his wrong side of the road. In *Wayde v. Carr*, 2 Dow. & Ry. 255, the defendant's carriage was on the wrong side of the road, and the driver, in attempting to pass a hackney-coach which interposed between the carriage and the plaintiff's gig, on the near instead of the off side, injured the plaintiff, and it was held that it was for the jury to decide the question of negligence, without regard to the law of the road. The report of the case says: "The court, however, said that whatever might be the law of the road, it was not to be considered as inflexible and imperatively governing a case of this description. In the crowded streets of a metropolis, where this accident happened, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary. The question in this case is a question of negligence. Of this the jury were the best judges; and, independently of the law of the road, it was their province to determine whether the accident arose from the negligence of the defendant's servant." See also *Lloyd v. Oglesby*, 5 C. B., N. S., 667. It is believed that in this country a stricter rule is applied, and that where one party is on his right side of the road, endeavoring to obey the law of the road, and the other party is not, the latter will be held liable for any injury that may arise from a collision between them, caused by that fact alone. It is at least some evidence of legal negligence that a party was at the time of the collision on the wrong side of the road: *Brooks v. Hart*, 14 N. H. 307; *Simmons v. Stellenmerf*, 1 Edm. Sel. Cas. 194. In the former case, Woods, J., delivering the opinion of the court, said: "Ordinarily, if one traveler in meeting another be found upon the half of the way appointed to him by the statute, traveling with ordinary care and prudence, and he sustain an injury by a collision with the vehicle of another, who is upon that part of the way to which he has not the statutory right, the individual who has thus sustained the in-

jury may have redress by action against him who was thus on the part of the way to which the statute did not give him the right. The traveler who thus travels prudently and carefully upon the half of the way assigned to him will ordinarily pass at the hazard and risk of him who trenches upon his rights in the manner already stated. Nor in such a case would damage arising from collision, or other cause of like character, form the only ground of a right of action. Damage arising from detention of the traveler would probably furnish an equally valid and substantial ground or cause of action." And even in England it is held that where parties meet on a sudden, the party on the wrong side should be held answerable for the injury that may happen, unless it clearly appears that the party on the right side had ample means and opportunity to prevent it: *Chaplin v. Hawes*, 3 Car. & P. 554.

BOTH PARTIES ARE BOUND TO EXERCISE ORDINARY CARE to avoid collision or injury. And the fact that one traveler is not on the proper side of the road, or does not turn to the right side, does not absolve another from the duty of exercising ordinary care to avoid injury to himself and his property or to prevent injury to the party who is in the wrong. A traveler on a highway is not with foolhardiness to rush into danger because his fellow-traveler has wrongfully given him the opportunity to receive an injury. As was said by the court in *Parker v. Adams*, 12 Met. 415: "A traveler may well occupy any part of the road, if no other person is occupying any portion of it. When, by reason of meeting another traveler, the occasion requires it, he must seasonably turn to the right. The law imposes this duty; but his disregard of that duty will not justify the traveler who may be on the proper side of the road in voluntarily or carelessly permitting himself to be injured either in his person or property, and then seeking to recover damages therefor of his fellow-traveler who was wrongfully on the left of the center of the road:" *Palmer v. Barber*, 11 Me. 338; *Kennard v. Burton*, 25 Id. 39; *Bigelow v. Reed*, 51 Id. 325; *Smith v. Gardner*, 11 Gray, 418; *Spofford v. Harlow*, 3 Allen, 176; *Daniels v. Clegg*, 28 Mich. 32; *Brooks v. Hart*, 14 N. H. 307; *Washburn v. Tracey*, 2 D. Chip. 128; *Neanow v. Uttech*, 46 Wis. 582, citing the principal case. A person lawfully using a public highway has a right to assume that a fellow-traveler will exercise ordinary care and prudence, and to govern his own conduct in determining his use of the road accordingly. This assumption he may rely on, not to justify carelessness on his own part, but to warrant him in pursuing his business in a convenient manner: *Daniels v. Clegg*, 28 Mich. 32; *Harpell v. Curtis*, 1 E. D. Smith, 78; *Baker v. Fehr*, 97 Pa. St. 70.

NEGLIGENCE.—The mere fact that the plaintiff was riding on the fender or outside platform of a sleigh, in Boston, was held not to be evidence of such negligence as to prevent a recovery for injury caused by collision with another sleigh: *Spofford v. Harlow*, 3 Allen, 176. The mere fact that one injured by collision between his own and another's vehicle in the street sees the other a considerable distance away, and from there until the collision takes place, does not of itself show negligence, but that is a fact for the jury: *Wood v. Luscomb*, 23 Wis. 237. Where two alternatives are presented to a traveler as modes of escape from a collision, either of which he might take as a careful and intelligent person, the law will not hold him guilty of negligence for taking either. The only question to be determined in such a case is, Did he select with ordinary care? *Larrabee v. Sewall*, 66 Me. 376. In the case of *Fox v. Sackett*, 10 Allen, 535, the injury to the plaintiff was caused by a collision with the defendant's wagon which had been left standing in the road. At the time of the collision, the plaintiff, who had seen the wagon

in the daytime, was driving a gentle horse, on a dark evening, at a slow trot along the road. He was a good driver, but he was looking out on his side for a blanket which he had lost, and his companion was looking for the same on the other side, and neither of them saw the wagon. It was held that, as a matter of law, the plaintiff could not be considered as so negligent as to preclude a recovery, but that the question should be left to the jury. It is negligence for a man to leave his horse and cart standing in the street, and he will be liable for any injury that may result therefrom: *Mudge v. Goodwin*, 5 Car. & P. 190. When in a city a horse attached to a carriage is found running on a sidewalk, the law presumes negligence on the part of the owner, and he will be held liable for injury caused by him: *Hummell v. Wester*, Bright. 133; *Dickson v. McCoy*, 39 N. Y. 400. And the fact that horses got loose and ran away after being hitched is some evidence of negligence in the hitching of them: *Strup v. Edens*, 22 Wis. 432. Where a traveler cannot safely turn to the right on meeting another vehicle, the law will not hold him guilty of negligence for not undertaking impossibilities: *Johnson v. Small*, 5 B. Mon. 25.

CONTRIBUTORY NEGLIGENCE.—A party is not entitled to redress for an injury sustained in meeting and passing another on the highway, where his own negligence contributed to the injury: *Kennard v. Burton*, 25 Me. 39; *Bigelow v. Reed*, 51 Id. 325; *Brooks v. Hart*, 14 N. H. 307; *Belton v. Baxter*, 54 N. Y. 245; S. C., 14 Abb. Pr., N. S., 404; *Washburn v. Tracey*, 2 D. Chip. 128; *Woolf v. Beard*, 8 Car. & P. 373.

FOOT-PASSENGERS HAVE RIGHT TO USE CARRIAGE-WAY as well as the sidewalk, and walking in the carriage-way is not *prima facie* evidence of want of ordinary care. Nor will negligence be inferred from that fact alone: *Coombs v. Purrington*, 42 Me. 332; *Boss v. Litton*, 5 Car. & P. 407. But a foot-passenger in crossing the street of a city has no prior right of way over a passing vehicle. Both are bound to exercise ordinary care to avoid collision: *Belton v. Baxter*, 54 N. Y. 245; S. C., 14 Abb. Pr., N. S., 404; *Barker v. Savage*, 1 Sweeny, 288. Erle, C. J., in delivering his opinion in *Cotton v. Wood*, 8 C. B., N. S., 571, said: "It is as much the duty of foot-passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers." Even a paralytic has the right to walk in the road, and is entitled to have persons driving carriages along the road exercise reasonable care to avoid injuring him: *Boss v. Litton*, *supra*. In *Cotterill v. Starkey*, 8 Car. & P. 691, it was held that the rule as to carriages being on the right side of the road does not apply to carriages and foot-passengers, for as regards a foot-passenger, a carriage may go on either side.

LAW OF ROAD APPLIES TO PRIVATE WAYS as well as to public highways: *Danforth v. Durell*, 8 Allen, 242. It extends to all places appropriated, either *de jure* or *de facto*, to the purpose of passing with carriages, whether they are so appropriated by public authority, or by general license of the owner thereof, expressed or implied; and such owners themselves while using their land as a road must conform to this law: *Commonwealth v. Gammons*, 23 Pick. 201. The rule that travelers meeting must seasonably turn to the right does not apply when one vehicle is passing along one street and another is passing into said street from a cross-street: *Lovejoy v. Dolan*, 10 Cush. 495. As there is no statute regulating the manner in which persons shall drive when they meet at the junction of two streets, the rule of the common law applies, and each person must use reasonable care to avoid a collision, adapted to the place and the circumstances: *Garrigan v. Berry*, 12 Allen, 84. In *Hegan v.*

Eighth Ave. R. R. Co., 15 N. Y. 380, it was held that the rule requiring vehicles to turn to the right has no application to the meeting of railroad cars with common vehicles in the streets of a city. In that case, the plaintiff's cart was struck by the defendant's car as he was turning off the track to the left, and it was held that that fact did not of itself put the plaintiff in the wrong. If a party runs his wagon on the rails of a street-railway, he is bound to use more care to avoid a collision than if he was not on the track, and if through negligence or willfulness on his part a collision occurs, he should not have damages against the company, even though its servants are also in fault: *Wilbrand v. Eighth Ave. R. R. Co.*, 3 Bosw. 314.

The rule requiring persons meeting on a highway to keep to the right of the center of the worked part of the road does not apply in the winter season, when the depth of the snow renders it difficult or impossible to ascertain where the center of the worked part of the road is. In such case the center of the road is the center of the beaten or traveled track, without reference to the worked part of the road: *Jaquith v. Richardson*, 8 Allen, 213; *Smith v. Dygert*, 16 Barb. 613.

The right of the center of the road means the right of the center of the worked part: *Earing v. Lansing*, 7 Wend. 185. The "traveled part of the road" means that part of the road which is wrought for traveling, and is not confined simply to the most traveled part: *Daniels v. Clegg*, 28 Mich. 32.

PARTY IS NOT LIABLE FOR INJURY CAUSED BY INEVITABLE ACCIDENT: *Goodman v. Taylor*, 5 Car. & P. 410. But, to avoid responsibility on the ground of inevitable accident, it must appear that the defendant was without fault: *Center v. Finney*, 17 Barb. 94.

TRAVELER MAY PASS OVER ADJOINING CLOSE when the highway is obstructed or impassable: *Kent v. Judkins*, 53 Me. 160; *Hedgepeth v. Robertson*, 18 Tex. 858.

TRAVELER IS BOUND TO HAVE HIS HARNESS AND CARRIAGE IN GOOD CONDITION, and is liable for any damage that may result from his failure in this respect. It is negligence on his part not to have good tackle: *Welsh v. Lawrence*, 2 Ch. 262; *Cotterill v. Starkey*, 8 Car. & P. 691; *Johnson v. Small*, 5 B. Mon. 25; *Smith v. Smith*, 2 Pick. 621; *Murdock v. Warweek*, 4 Gray, 178.

DRIVING AT IMMODERATE RATE OF SPEED IS CULPABLE NEGLIGENCE, and if injury result from it, without fault on the part of the person injured, the author of it will be liable therefor: Angell on Highways, sec. 342. In *Kennedy v. Way*, Bright. 186, it was held that driving on a public highway at the rate of a mile in four minutes was unlawful and negligent.

EXEMPLARY DAMAGES MAY BE RECOVERED for willfully bringing a horse and vehicle into collision and cruelly wounding and injuring the plaintiff's horse: *Lewis v. Bulkley*, 4 Daly, 156.

TRAVELER SHOULD STOP REASONABLE TIME, where it is not practicable to pass to the right in meeting another on a public highway: *Kennard v. Burton*, 25 Me. 39; *Brooks v. Hart*, 14 N. H. 307. But in *Wood v. Luskomb*, 23 Wis. 287, it was held that ordinary care does not require one traveler to stop till the other passes.

TRESPASS IS PROPER FORM OF ACTION for injury caused by one person driving his carriage against another's on the highway: *Leame v. Bray*, 3 East, 903; *Daniels v. Clegg*, 28 Mich. 32; *Howard v. Tyler*, 46 Vt. 683.

PORTION OF HIGHWAY ON WHICH FUNERAL PROCESSION IS FORMED is, for the time being, in the lawful occupation of the family having the funeral, and they have the right to determine the order of the procession; and when they

assign a hackman a place in the procession, he has a right to use reasonable force to prevent its occupancy by another: *Goodwin v. Avery*, 28 Conn. 585.

PERSON TRANSPORTING UNUSUAL MACHINERY OVER HIGHWAY should employ a sufficient number of men to warn travelers of the danger of their horses taking fright at it, and, if necessary, to assist such travelers in passing it: *Bennett v. Lovell*, 12 R. I. 166.

USE OF STEAM-ENGINE AS MEANS OF LOCOMOTION OF HIGHWAY is not necessarily a nuisance. Those using horses cannot exclude those using steam-engines. Improved modes of locomotion are admissible. The question to be determined in such a case is, whether or not the engine has been so negligently used as to give a right of action: *Macomber v. Nichols*, 34 Mich. 212.

ERROR IS NOT PRESUMED, BUT MUST APPEAR FROM RECORD, in order to be ground for reversal: See *Sewell v. Eaton*, 70 Am. Dec. 471, note 473; *Sanford v. Howard*, 68 Id. 101, note 108, where other cases are collected; *Outler v. Hurlbut*, 29 Wis. 168, citing the principal case.

ADAMS v. FILER.

[7 WISCONSIN, 306.]

DEFENDANT, BY PLEADING PUIS DARRIN CONTINUANCE, WAIVES ALL OTHER PLEAS, and admits the cause of action as set out in the plaintiff's declaration.

WHEN ANSWERS OF GARNISHEE, ON HIS EXAMINATION ON OATH IN PROCEEDINGS BY ATTACHMENT, are satisfactory to the plaintiff, the judgment of the court may be taken thereon; but where his answers are not satisfactory to the plaintiff, an issue may be made up and tried by a jury as in other cases.

WHERE PROPERTY IN HANDS OF GARNISHEE IS ADJUDGED TO BELONG TO DEFENDANT in the attachment proceedings, and the garnishee acts in good faith, the judgment is conclusive as between the plaintiff, the defendant, and the garnishee.

JUDGMENT AGAINST GARNISHEE, ADJUDGING PROPERTY IN HIS HANDS TO BELONG TO DEFENDANT in the attachment, does not conclude a third person, not a party to the proceedings, who claims title to the same property.

GARNISHEE DOES NOT PROTECT HIMSELF FROM LIABILITY TO THIRD PERSON claiming title to the property attached by merely notifying the latter of the pendency of the proceedings, but he is bound to request him to defend, and tender to him the conduct of the defense.

WHERE VENDOR, GARNISHED IN ATTACHMENT PROCEEDINGS TO WHICH HIS VENDOR IS NOT PARTY, fails to apprise the latter that the title acquired by purchase from him has been called in question, gives him no notice of the garnishee process, and does not invite or request him to defend such title, a judgment rendered against him in such garnishee proceedings is no defense or bar to an action brought against him by such vendor to recover the price of the property sold.

REQUEST TO JOIN IN COMMISSION TO TAKE TESTIMONY IS NOT OFFER OF DEFENSE of the suit, to the person of whom such request is made.

NOTICE APPENDED TO GENERAL ISSUE IS GOOD ONLY FOR PARTICULAR PURPOSE for which the statute allows it to be filed; it is not binding as an

admission upon the party filing it, and has no other effect upon the opposite party than to allow the matters of which it gives notice to be given in evidence.

ERROR to Milwaukee county court. Filer, the defendant in error, sued the Adamses, the plaintiffs in error, upon a contract of sale of a quantity of tobacco, for which the latter had agreed to give their promissory notes. After Filer delivered the tobacco, and before the Adamses gave their notes, Arkenburgh & Co. garnished the Adamses, claiming that the tobacco was the property of Francis & Co., who were judgment creditors of said Arkenburgh & Co. On the final hearing in the garnishee proceedings, the tobacco was decided to be the property of Francis & Co., and the Adamses were adjudged to pay its value to Arkenburgh & Co. The Adamses then pleaded *puis darrein continuance* as a defense to the action in this case, the adjudication and recovery in the garnishee proceedings. The plaintiff's counsel read to the jury the pleadings on file in this case, and rested, whereupon the defendants' counsel moved for a nonsuit, on the ground that the plaintiff, not having offered any evidence of the value of the tobacco, nor any proof of damages, was not entitled to recover. The court overruled the motion, and the defendants excepted. After the introduction of the testimony, the substance of which is stated in the opinion, the court gave the following instructions to the jury: 1. If the jury find that the plaintiff Filer had seasonable notice of the pendency of the garnishee proceedings against the defendants, and was requested by the defendants to defend such proceedings, the judgment therein against the defendants is a good defense to this action; 2. A request made upon the attorney of Filer, and whom he had employed to look after and protect his interest in regard to his claim for the tobacco, alleged to have been sold to the defendants, to appear and defend in the garnishee proceedings, if made after Filer had had notice of the pendency of the garnishee proceedings, would be sufficient to enable the defendants to protect themselves under the judgments in the garnishee suits; but proof that any person was employed only to prosecute this suit would not be sufficient proof of such general agency in regard to plaintiff's claim to said tobacco; 3. If the jury find for the plaintiff, the measure of his damages is the principal of the notes mentioned in the declaration, with interest from their maturity; 4. The plaintiff is entitled to recover in this action the amount of the notes mentioned in the declaration, with interest from their maturity, unless the

defendants have shown that they requested the plaintiff to defend the garnishee proceedings; 5. If any person so requested the plaintiff to defend the garnishee proceedings, it must be proved that such person had authority from the defendants to make such request, or the plaintiff must recover; 6. Such request should be distinct, and in such terms as to be clearly understood by the person to whom made; 7. Such request must be made seasonably; 8. Such request must be made of the plaintiff, or some person authorized by him to receive it; and it is not sufficient evidence of such authority that the persons of whom the request is made are attorneys for the plaintiff in this action; 9. It was competent for the defendants to plead *puis darrein continuance* the matters now pleaded by them, and, in addition, that the tobacco sold to Messrs. Adams was the property of Francis & Co., and not of Filer, at the time of such sale; 10. The allegations of the declaration are to be taken as true, and no evidence need be offered to sustain them, unless as to the common counts; 11. The plaintiff would not be at liberty on this trial to introduce evidence as to the title of the tobacco, inasmuch as the question is not put in issue by the defendants' plea. To each of these instructions, as given, the defendants' counsel excepted. The jury found a verdict for the plaintiff, upon which judgment was entered, whereupon the defendants sued out their writ of error.

Emmons and Van Dyke, for the plaintiffs in error.

E. G. Ryan, for the defendant in error.

By Court, SMITH, J. The first error complained of in this case is the refusal of the judge below to nonsuit the plaintiff. But this could not be done under the state of pleading then existing. The defendants had pleaded *puis darrein continuance*, which was a waiver of all other pleas, and admitted the cause of action as set out in the plaintiff's declaration: *Adler v. Wise*, 4 Wis. 159; *Culver v. Barney*, 14 Wend. 161; Ch. Pl. 697, 698.

It is also alleged that the court erred in sustaining the demurrer to the defendant's plea. But as the pleadings are not set out in the printed case, we do not feel called upon to examine the point.

The other and principal points on which the plaintiffs in error rely to reverse the judgment of the court below arise out of the instructions given to the jury, or withheld from them

against the request of the plaintiffs in error, to which exceptions were taken on the trial.

This case brings under review the several provisions of our attachment law in relation to garnishees, a law difficult to be so framed, and still more difficult to be so administered, as to do exact justice to all the parties affected by its operation. The law provides for the attachment of property and credits of the defendant in the hands of a third person, and for the summoning of such person as garnishee, and for his examination on oath touching the property, credits, or effects in his hands belonging to the defendant. If his answers are satisfactory to the plaintiff, the judgment of the court may be taken thereon; but if not, an issue may be made up, and tried by a jury as in other cases. In this case, such an issue was made up, on which the jury rendered a verdict in favor of the plaintiffs in the attachment; on which judgment was rendered. It is contended that this judgment is an absolute bar to the right of the plaintiff below to recover.

It should be observed that the parties in the attachment suit were Arkenburgh & Co., plaintiffs, against Francis & Co., defendants, and the present plaintiffs in error as garnishees of Francis & Co. The defendant in error was in no sense a party to the suit, but was a stranger thereto. He did not appear therein, nor was any process served upon him by which the court obtained jurisdiction of his person. He had no day in court.

It is insisted that the payment of the judgment by the Adamses was compulsory; that the debt or property was taken from them by process of law, and that they should therefore be protected.

It would seem to be unjust that a debtor can be compelled to pay his debt to the creditor of his creditor by the judgment of a court of competent jurisdiction, and still remain liable to the latter, or be compelled to pay it twice. And it also seems unjust that a creditor shall be compelled to lose his debt by any proceedings by or among strangers to which he has not been made a party, or had any opportunity to be heard.

Ordinarily, the creditor of the garnishee is the defendant in the attachment, and has not only the opportunity to contest the original cause of action, but also the liability of the garnishee. In such cases, it is tolerably well settled that when the garnishee acts in good faith, the party would be bound by the judgment. A sues B by attachment, and attaches property in the hands of C, which is alleged to be the property of B.

On the trial, the property is found to belong to B, the defendant in the attachment. As between A, B, and C, this judgment is conclusive. But does this proceeding settle the title to the property against all the world? Is D, who may claim the property, bound by this proceeding whether C, the garnishee, chose or not to disclose his title on the trial? Suppose the property in the hands of C was a horse, placed there by B for keeping, and attached by A as the property of B, and it should be so adjudged: would that judgment bind D, the real owner? Suppose the tobacco which was the subject-matter in controversy had been replevied from the Adamses by Francis & Co.: this would be a compulsory process of law equal in dignity, at least, to a garnishee process; but would the judgment in such case conclude Filer, the vendor of Adams, unless Filer had had the proper opportunity to defend his title in that suit? Most of the cases cited by the plaintiffs in error are such as involve the right of the respective parties in the attachment suit, viz., the plaintiff, the defendant, and the garnishee; and as to such parties, we see no reason why the judgment against the garnishee, provided he has acted in good faith, should not be binding upon the defendant in attachment, he being a party to the suit. At all events, such seems to be the prevailing doctrine, even in proceedings by foreign attachment in which the defendant has not been served with process. It was not, however, so settled without a struggle. But the proceeding was *inter partes* to the record, and at all events binding upon all the property of the defendant found within the jurisdiction.

The reason urged by the counsel for the plaintiffs in error why the judgment should be a protection to them, because the payment thereof by them was compulsory, or what is more in point, the property or its value was taken from them by process of law, is not without force. But let us examine its true weight, and see whether the same reason will not apply to many other inevitable evils, owing to the inherent defects in the administration of justice.

Suppose Arkenburgh & Co. had claimed the tobacco in their own right, and had sued the Adamses in trover for its value, and had recovered: would that recovery be a bar to an action by Francis & Co. claiming the title? Would it have concluded Filer? If it would not conclude Filer, then it would interpose no legal impediment to his recovery, and the same administrative anomaly would be presented as in the case before us. Juries do not always find the same verdict

upon the same state of facts, and, unfortunately, courts do not always agree in their application of the law. Until absolute perfection can in all cases be attained, injustice will sometimes be done. Even courts of equity, with all their flexibility, are not always equal to the demands of absolute justice. Certain principles of jurisprudence and rules of administration must be observed, to depart from which, on the supposed exigencies of a particular case, would be a greater evil than the temporary injury of an individual which the law could not redress or prevent without an infraction of those principles.

One of the fundamental principles of jurisprudence in all civilized countries is that every person is entitled to his day in court; that his rights of person, reputation, or property shall not be concluded unless he has been brought into court in some manner, and made a party to the proceedings involving such rights. It can scarcely be necessary to quote authorities to sustain this principle, for it lies at the very foundation of the common-law system of jurisprudence. Sir William Blackstone says: "The court can determine nothing unless in the presence of both parties in person, or by their attorneys, or upon default of one of them, after his original appearance, and a time fixed for his appearance in court again:" 3 Bla. Com. 316.

I could go on and cite from all writers upon elementary law this requisition as a fundamental, primary, indispensable condition in all judicial proceedings, whereby a party should be bound, that he should have had his day in the court which may have condemned him; in other words, that he should in some manner recognized by the forms of law become a party or privy to the proceedings, by the record of which he is sought to be charged or concluded.

It is no answer to a claim of property set up against me by A that in a trial between me and B the title was adjudged to be in me; or that in the same proceeding the title was adjudged to be in B, and that I had been compelled to deliver it over, or respond for its value. I have no reference here, of course, to the effect of a judgment upon privies in estate or otherwise; for the rule in such cases, it is conceded, has no application to the case under consideration. I have a right to try my title or have my rights adjudicated by a competent tribunal of my own selection, or by a competent tribunal before which I am lawfully called to defend or protect my rights.

In some states, and in some cases, by statute, a mode of service is provided, whereby a person is sought to be brought within the jurisdiction of the court, other and different from

personal service. Sometimes this is effected by seizing the property of the defendant within the jurisdiction, and thus compelling an appearance; in other cases, notice by publication of the pendency of the suit is made, for certain purposes, equivalent to the personal service of the process of the court. But in all these cases, the principle is recognized that the party whose rights are concluded by the judgment of a judicial tribunal must have his day in court; that is, he must have an opportunity to be heard, and be made subject to the jurisdiction of the tribunal by service of its process or its equivalent.

There is a class of cases where the officer of the law is protected against all parties in the proper execution of the specific process of the court; as when an officer executes a writ of replevin by seizing the particular property named in the writ according to the command thereof, or in the execution of a search-warrant, or a warrant for the arrest of a person named, etc. But this protection extends to the officer only, and by no means applies to the parties who call into operation the agencies and instrumentalities of the law.

The pleadings here reduce our inquiry to a very narrow compass. The Adamses do not defend by a direct impeachment of the title of Filer, their vendor, but they waive every defense of that kind which may be ordinarily available between vendor and vendee, and claim that the record of the judgment and its satisfaction preclude any further demand or inquiry as to them. The title of Filer is not put in issue by the defendants' plea, every plea or defense being waived except that set up by the plea *puis darrein continuance*.

It appears that the attachment suit against Francis & Co. was continued at one or more terms to procure evidence, and that this suit of Filer against the Adamses was also continued at the same terms. Messrs. Emmons & Van Dyke prosecuted the Adamses in the garnishee suit, and defended them in the suit of Filer against them. Mr. Van Dyke applied to the Adamses to join in a commission to take testimony in New York, and they did so. He also applied to Mr. Salomon, of the firm of Smith & Salomon, who were the attorneys of Filer in this suit, to join in the commission, who declined. Except this offer by Mr. Van Dyke, the attorneys of Filer, Smith & Salomon, had no proposition or application made to them to defend the garnishee proceedings. Neither the Adamses, nor any one in their behalf, offered or requested Filer to defend.

They gave no notice to Filer, or to Smith & Salomon, or to any one in behalf of Filer, of the pendency of these garnishee proceedings.

We are therefore clearly of the opinion that the record of the proceedings in the garnishee suit did not conclude Filer's rights, unless the Adamses discharged their duty in the premises. And we are also of the opinion that to protect themselves the garnishees should have not merely notified Filer of the pendency of the proceedings, but that they should have also tendered to him the conduct of the defense; or, in other words, requested him to defend. The essence of the garnishee's equity consists in the fact that he has done his full duty, and has been compelled to pay; for if he pay when he is not legally bound to do so, he cannot avail himself of such payment: *Flower v. Parker*, 3 Mason, 247; 8 Blackf. 418; *Myers v. Urich*, 1 Binn. 25; *Moger v. Lobengeir*, 4 Watts, 390; Drake on Attachments, secs. 732 et seq. In *Prescott v. Hull*, 17 Johns. 284, it was held that when the garnishee knew of an assignment of the debt in his hands, and made no mention of it in his answer, the judgment against him will be no protection to him against an action by the assignee: *Colvin v. Rich*, 3 Port. 175; *Carroll v. Meeks*, Id. 229; *Nugent v. Opdyke*, 9 Rob. (La.) 453; *Swartwout v. Payne*, 19 Johns. 294 [10 Am. Dec. 228], and authorities there cited.

All these cases, and very many others which might be cited, show that the garnishee has a duty to perform, even in reference to the defendant in the attachment suit, in order to shield himself by the record of the judgment therein. We have already seen from the authorities before cited how strictly he is held to the performance of all his duties, where the rights of an assignee of the debt may, by possibility, intervene. How much more sternly would the law require of a vendee a faithful vindication of the title of his vendor when thus assailed; or, in the want of such vindication, a full relinquishment and tender of the conduct of the suit wherein the title of the property was brought in issue.

In this case, the Messrs. Adams do not appear to have taken the first step to apprise their vendor, Filer, that the title which they had acquired by purchase from him had been called in question. They have given him no notice of the garnishee process served upon them. They have not invited or requested him to defend his title. Furthermore, after the tobacco had been attached in their hands as garnishees, alleged to be the property of Francis & Co., instead of giving Filer notice that

his title to the tobacco was questioned by the garnishee process, and that therefore his sale to them might be unwarranted, they seem to have gone on and appropriated the tobacco to their own use, the possession of which they had obtained from Filer by virtue of their purchase from him. They do not seem to have repudiated the sale of the tobacco by Filer to them; when, as alleged by them, the title to the tobacco was found to be in Francis & Co. We do not find that they offered to deliver the same to the plaintiffs in the attachment, or that they gave Filer any opportunity to contest his title, but that they availed themselves of the possession which they obtained by means of their purchase of Filer, and through that means used the property in specie, risking their liability to the real owner for its real or agreed value, as the case might be.

Undoubtedly, it was competent for the Adamses to contest the title to the tobacco in this suit of Filer against them. They might have defended, if they had thought proper, against this contract of sale, on the ground that the vendor had no title in the property, and that the consideration had failed. All defenses of this kind were open to them, by which they might have required Filer to make good his title to the property. The merits of the case were proper to be discussed and determined, as was intimated in *Enos v. Tuttle*, 3 Conn. 27. But all such defenses were waived by their plea, and by that they must now abide.

We have carefully examined all of the cases cited by the plaintiff in error, from which they deduce the doctrine that the garnishee is protected upon the sole ground that he is compelled by the court to deliver the property or pay its value. But we do not so understand them. It is said by the counsel for the plaintiffs in error that "none of the cases which hold that a garnishee, against whom there has been a recovery, shall be protected in a subsequent suit, proceed upon the notion that the plaintiff in the second suit was a party to the former, but upon the broader ground that the payment by the garnishee was compulsory, and that the debt or property was taken from him by process of law." I do not propose to review these cases in detail, but on such review it will be found that in no case cited has it been distinctly held that a stranger to the suit has been concluded by any process to which the garnishee has been a party. On the contrary, in *Enos v. Tuttle*, 3 Conn. 27, it is distinctly asserted that the right of the stranger remains unaffected by the garnishee proceedings, and the merits of his

claim to be tried like all other claims. In none of these cases is it intimated that the garnishee is placed in a position like that of an officer executing a writ of replevin, where he is commanded by his writ to replevy the specific property named therein. Even in this case, the protection of an officer, as against a stranger, has been most seriously contested. But the garnishee can contest the title, the officer cannot; the garnishee may call in his creditor or vendor to defend, the officer cannot. It is vain to say that the real owner of property recovered in the hands of the garnishee may have his remedy over against the plaintiff in the attachment. It is not within the power of the court thus to transfer liabilities upon and to transpose parties to contracts, and thus impair or destroy their obligation. The attaching creditor may be, as in this case, without the jurisdiction. It would be the height of injustice to permit the garnishee to sit quietly and allow property in his hands to be taken to satisfy the debt of a stranger to his vendor, or to convert the property to his own use, and answer for its tried value, between him and the plaintiff in attachment, without giving his vendor notice of the dispute of his title and the privilege of defending it, or to conclude him as to its value. It must be recollected that Filer was a stranger to the suit between Arkenburgh & Co. and Francis & Co. and the Adamses; that the Adamses might have required Filer to protect their title as vendees, but they did not; that they kept and used the property, accounting to the plaintiff in attachment for the assessed value in that suit, and thus seek to be absolved from their contract of purchase with Filer. It was competent for them, as before remarked, to dispute his title by proper pleadings, but they did not. They might have discharged their duty to Filer by tendering the defense of his title to him in the garnishee suit, but they did not. We have been unable to find any authority which will excuse them from the fulfillment of their contract of purchase.

It is unnecessary to pursue this discussion further. We think the instructions of the court to the jury were correct. The garnishee, in order to protect himself, must discharge his duty. The Adamses should have given Filer notice of the proceedings against them, and tendered him the defense, at the earliest practicable moment. So far from doing this, it does not appear that they defended at all. The same counsel who were prosecuting them as garnishees were defending them as the vendees of Filer. But of course they could not at the same

time act for the plaintiffs in the attachment and for the garnishees. The latter, so far as it appears, neither defended themselves as the representatives of Filer's interest nor requested him to do so. It would be monstrous injustice to allow the rights of a person to be concluded in such a manner. It would have been no hardship upon the plaintiffs in error to be required to notify the defendant in error of their garnishment and requested him to take upon himself the defense of his title. Any rule short of this would place it in the power of a fraudulent garnishee to make a record which would bar his creditor, or even a stranger, without having an opportunity to be heard.

It is claimed by the counsel for the plaintiffs in error that Filer had notice of the garnishee proceedings in two ways: 1. By Mr. Van Dyke requesting Mr. Salomon to join in the commission; and 2. By a notice of the same attached to the general issue originally filed in this suit. Of the former we have already spoken. Mr. Van Dyke was not in that matter the agent or attorney of the Adamses. Even if he were so, a request to join in a commission is not an offer of the defense in the suit, and if it were such, it was not seasonable.

In regard to the notice appended to the general issue, it is only necessary to remark that such notices are only held good for the particular purpose for which the statute allows them to be filed. They are not binding as admissions upon the party filing them, and can have no other effect upon the opposite party than to allow the matters of which they give notice to be given in evidence. In this case, the notice would have permitted the defendants below to have given in evidence the facts therein mentioned in impeachment of Filer's title, had they not by their plea *puis darrein continuance* waived all former pleas, and among them the general issue, and the matters set out in the notice thereto subjoined. But such a notice could extend no further. It would be notice of nothing in another suit. It is not even regarded technically as a part of the record in the same suit.

The instructions of the court as to the measure of damages were correct, viz., the amount of the notes.

On the whole case, we are unable to discover any error in the proceedings in the court below, and the judgment must therefore be affirmed.

Judgment affirmed, with costs.

GARNISHEE, RIGHTS AND DUTIES OF: See *Waters v. Washington Ins. Co.*, 63 Am. Dec. 451, note 456, where other cases are collected. A garnishee is bound to exhaust all means to avoid a judgment against him and give notice to the party interested, to know of the pendency of the proceedings: *Pierce v. Chicago & N. W. R'y Co.*, 36 Wis. 289, citing the principal case.

JUDGMENT AGAINST GARNISHEE, EFFECT OF: See *Gunn v. Howell*, 62 Am. Dec. 785, note 792; *Warner v. Conant*, 58 Id. 178; *Smoot v. Helava*, Id. 310; *Sessions v. Stevens*, 46 Id. 339, note 341, where the subject is discussed at length. A person is not bound by judgment in garnishee proceedings to which he was not a party: *State v. Judge of County Court*, 11 Wis. 53; *Sanger v. Mellon*, 51 Id. 563, both citing the principal case.

PLEA PUIS DARREIN CONTINUANCE: See *Brown v. Brown*, 48 Am. Dec. 52, note 56, where other cases are collected: *Costar v. Davies*, 46 Id. 311; *Boyd v. Weeks*, 43 Id. 749, 750, where other cases are collected; *May v. State Bank*, 40 Id. 728.

THE PRINCIPAL CASE IS CITED in the following cases to the points stated below: in *Du Pont v. Davies*, 35 Wis. 361, parties can, if they choose, put the responsibility of the litigation on those under whom they claim, and so conclude them by the judgment; in *Stanley v. Goodrich*, 18 Id. 509, where a party bound to defend is notified of the pendency of the proceeding and requested to defend, and is tendered the conduct of the defense, and he neglects to do so, and judgment goes against the party so notifying and requesting him, he will be concluded thereby; in *Phmer v. Wausau Boom Co.*, 49 Id. 456, notice to parties interested in judicial proceedings, when given, binds not only the parties notified, but their privies also, who purchase an interest in the property in litigation, *pendente lite*; and in *Saveland v. Green*, 36 Id. 619, there is no distinction, with respect to the notice required, between actions on covenants in deeds and other actions, in which it is sought to bind persons by judgments to which they are neither parties nor privies, and mere notice in that class of cases is not sufficient.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

DUPREE v. STATE.

[28 ALABAMA, 330.]

TERRORS PROVED TO HAVE BEEN MADE BUT SHORT TIME BEFORE COMMISSION OF HOMICIDE, which are indicative of an angry and revengeful spirit are admissible in evidence for the prisoner.

CIRCUMSTANCES HAVING NO DIRECT CONNECTION WITH CASE should not be admitted as evidence.

PERSONS OF MIXED BLOOD, FROM NEGROES OR INDIANS down to the third generation, are not competent witnesses against white persons, under the Alabama statute, and there must have been one white ancestor of each generation for three generations before a competency to testify can be established.

WRITTEN STATEMENT OF PERSON ALIVE AT TIME OF TRIAL, MADE AT CORONER'S INQUEST, will not be received in evidence.

WRITTEN STATEMENT OF WITNESS MADE AT CORONER'S INQUEST is admissible in evidence where witness has died since the inquest; but not merely because of emigration of the witness to another state.

PROOF IN CASE OF HOMICIDE, THAT DECEASED WAS ESCAPED CONVICT, offered in evidence to show his bad character, is irrelevant and inadmissible.

PARTICULAR ACTS OF MISCONDUCT ON PART OF DECEASED, and offenses against the law committed by him, but not connected with the case, are inadmissible to prove bad character.

CHARACTER OF PRISONER FOR PEACEFUL DISPOSITION AND HABITS is competent proof for him.

ACQUAINTANCE WITH PRISONER FOR EIGHT OR TEN YEARS QUALIFIES ONE TO TESTIFY AS TO HIS CHARACTER.

RESIDENCE IN IMMEDIATE VICINITY OF PERSON WHOSE CHARACTER IS SUBJECT OF INVESTIGATION is not an indispensable qualification of witness to testify as to character.

IT IS NOT ERROR TO REFUSE TO INSTRUCT JURY "that if they believed from the evidence there was a reasonable belief in his [the prisoner's] mind of

some great personal injury or bodily harm about to be committed on him by the deceased, and that there was reasonable ground on his part to believe that he was in danger of great bodily harm from the deceased, whether it actually existed or not, the killing, under the circumstances, would be excusable;” nor is it error to give the above instructions with a qualification that the danger must be imminent or threatening.

PROSECUTION for murder. William H. Dupree, having been indicted for the murder of one Smith, was convicted of manslaughter in the first degree. The state proved on the trial that deceased was shot and killed August 1, 1858, in Mobile county. One Williams testified that the decedent said that the prisoner’s folks had been killing his chickens, and that he intended to reciprocate, and that if the prisoner said a word about it he would cut his throat; that he would kill him anyhow. Witness, knowing the violent character of deceased, called upon the prisoner, told him what deceased had said, and advised him to swear out a peace-warrant. One Boyd, on behalf of prisoner, testified that deceased had threatened the prisoner in a violent manner with a loaded whip about three weeks prior to the killing, and these threats had been communicated to him by Boyd. One Keen testified that deceased entered prisoner’s premises and threatened with a loaded whip to strike one of his servants, but was prevented by witness and another. This testimony was all ruled out as irrelevant. Defendant offered three witnesses, who were the children of a woman by the name of Clara, to prove that they were present at the killing, and that it was done in self-defense. The children appeared to be white. The court held their testimony incompetent, on account of being of mixed blood. Witnesses were also excluded who were introduced to prove good character, who had known prisoner for eight or ten years, but who lived twenty-one miles from the place of killing. A witness who testified concerning the time of the killing was excluded because he was an escaped convict from the penitentiary of Georgia.

Daniel Chandler, for the prisoner.

M. A. Baldwin, attorney-general, contra.

By Court, A. J. WALKER, C. J. The threats proved by the witnesses Williams and Boyd were made but a short time before the commission of the homicide. They were communicated to the prisoner before the homicide, by the persons who heard them uttered. They were indicative of an angry and revengeful spirit, and of a determination to do violence to the

prisoner's person. Such threats were admissible in this case, and the court erred in excluding them: *Powell v. State*, 19 Ala. 577; *Carroll v. State*, 23 Id. 28 [58 Am. Dec. 282]; *Howell v. State*, 5 Ga. 48; *Monroe v. State*, Id. 85; *State v. Zellers*, 7 N. J. L. 220; *Shorter v. People*, 2 N. Y. 193 [51 Am. Dec. 286]; *American Law of Homicide*, 216; *Campbell v. People*, 16 Ill. 17 [61 Am. Dec. 49]; *Cornelius v. Commonwealth*, 15 B. Mon. 539.

The facts proved as to the conduct of the deceased, some weeks before, towards Breedlove, were irrelevant to the issue in this case. They pertained to a distinct and independent transaction, having no connection, which we perceive, with this case, and were properly excluded.

The children of Clara were incompetent witnesses. Their father, maternal grandfather, and great-grandfather were white men. Their great-grandmother was the child of a mulatto, by a negress. The great-grandfather is the first ancestor of pure white blood, to whom the genealogy of the witnesses can be traced. Beyond the great-grand ancestors, the ancestors of both sexes were either negroes or of mixed blood. If the descent of the witnesses is traced downward from their great-grandparents, one of whom was white, their grandparents are of the first generation, their parents of the second, and they themselves of the third generation. It follows that if, in determining the competency of the witnesses, we are to reckon from the ancestors, one of whom was white, the witnesses proposed in this case are in the third generation.

The section of the code pertaining to this question is as follows: "Negroes, mulattoes, Indians, and all persons of mixed blood descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, must not be witnesses in any cause, civil or criminal, except for or against each other:" Code, sec. 2276. This statute must be understood as requiring a computation of the generations from ancestors, one of whom is purely white; otherwise it might be that persons of mixed blood, by intermarriage among themselves, might produce descendants competent to testify against white men, without any admixture of additional white blood in any generation. We hold that there must be one white ancestor of each generation, for three generations, before a competency to testify can be established; and the proposed witnesses, being of the third generation, were incompetent to testify, and there was no error in rejecting them as witnesses.

The statement of the testimony given in by the widow of the deceased before the coroner on his inquest was not admissible. She was living. The testimony was not that of a deceased witness. No reason is suggested for the admissibility of the evidence, save that the witness had emigrated to Georgia. There is no rule which would justify the admission of such testimony on that ground.

So, also, the proof that the deceased was a convict, escaped from the Georgia penitentiary, was inadmissible. Particular acts of misconduct on the part of the deceased, and offenses against the law committed by him and not connected with this case, were inadmissible. For a still stronger reason, parol evidence of his having been a penitentiary convict was inadmissible. It is not allowable to go into proof of particular acts, unconnected with the case, to show the character of the deceased: *Nugent v. State*, 18 Ala. 521; *Pritchett v. State*, 22 Id. 89 [58 Am. Dec. 250]; *Franklin v. State*, 29 Id. 14.

The character of the prisoner for peaceful disposition and habits was competent proof for him: *Felix v. State*, 18 Ala. 720.

The witnesses by whom it was proposed to show the character of the accused had known him for eight or ten years, and were acquainted with his character. This was sufficient to qualify them to testify as to his character, notwithstanding they may have resided more than twenty miles from him. Residence in the immediate vicinity of the person whose character is the subject of investigation is not an indispensable qualification of a witness to testify as to the character. Such a remoteness of residence would not prove that the witness did not know what the character was, and therefore would not disqualify him to testify on the subject: *Hadjo v. Gooden*, 13 Ala. 718; *Martin v. Martin*, 25 Id. 201.

There was no error either in the refusal of the court to give the charges asked, without a qualification, or in the qualification of them as stated in the bill of exceptions: *Oliver v. State*, 17 Ala. 587; *Harrison v. State*, 24 Id. 67 [60 Am. Dec. 450]; *Noles v. State*, 26 Id. 31 [62 Am. Dec. 711]. The charges asked might have misled the jury, by making the impression upon them that the plea of self-defense was sustained, although there was not a reasonable belief of a present necessity to strike for his own protection. This court will never reverse for the refusal of a charge the tendency of which is to mislead the jury.

The judgment of the court below is reversed, and the cause remanded.

ADMISSIBILITY OF EVIDENCE OF THREATS BY DECEASED IN PROSECUTION FOR HOMICIDE: See *Campbell v. People*, 61 Am. Dec. 49, and extensive note thereto 53, citing many cases; *Keener v. State*, 63 Id. 269, and note 288; *Dukes v. State*, 71 Id. 371, and note 380.

EVIDENCE OF GOOD CHARACTER OF ACCUSED in criminal case: See *O'Bryan v. O'Bryan*, 53 Am. Dec. 134, and note citing other cases 135; and particularly as to character of person accused of murder, see *Commonwealth v. Webster*, 52 Id. 711, and note 733.

EVIDENCE OF CHARACTER OF DECEASED ON TRIAL FOR MURDER, to make out justification: See *Keener v. State*, 63 Am. Dec. 269, and note 288; *Dukes v. State*, 71 Id. 371, and note 381.

HOMICIDE, WHEN JUSTIFIABLE ON GROUND OF SELF-DEFENSE: See *Teal v. State*, 68 Am. Dec. 482; *Dukes v. State*, 71 Id. 371, and note 380.

COLLINS v. STATE.

[38 ALABAMA, 494.]

PERSON IS GUILTY OF RECEIVING STOLEN GOODS if he takes them under circumstances that would put a reasonable man of ordinary observation on his guard.

COURT HAS RIGHT TO GIVE TO JURY FURTHER OR EXPLANATORY CHARGES, in a case where counsel have voluntarily absented themselves from the court-room, if the prisoner be present.

INDICTMENT for receiving stolen goods. George Collins, having been indicted for receiving stolen goods knowing them to have been stolen, was convicted and sentenced to the penitentiary. During the trial, and after the jury retired, the solicitor and the prisoner's attorney, in the presence and with the approbation of the court, consented that the clerk should receive the verdict. The jury after a short time came in and asked for further instructions, which were given by the court in the presence of the prisoner, but in the absence of his counsel. The opinion states the instructions given. Defendant, by his counsel, excepted to this action of the court, and also to the charge rendered during his absence.

H. F. Drummond, for the appellant.

M. A. Baldwin, attorney-general, contra.

By Court, **STONE, J.** The charge of the court to which objection is here urged, throwing it into the form of a charge given, may be thus stated without doing violence to any of its terms: "If you find the goods had been stolen, then, on the question of knowledge, I charge you, that if you find the defendant received and concealed the goods, and received them under such circumstances that any reasonable man of ordinary observation would have known that they were stolen, and if

you find that the defendant knew of those circumstances, then you are authorized to find that the defendant knew they had been stolen."

It will be observed that this charge presents no question on what facts are necessary to constitute a larceny; nor does it undertake to define the constituent elements of a felonious receiving, under the statute: Code, sec. 3178. Its whole force is expended on the question of knowledge.

In further criticism of this charge, we may remark it does not command or direct the jury to find knowledge if they found the supposed facts. That would have been an invasion of their province. It simply instructed that body that if the specified facts existed, they were authorized—permitted, had authority—to find the fact of knowledge.

Knowledge of the theft, as an element of the offense, denounced by section 3178, could rarely be the subject of direct proof. Like most other facts, it may be inferred from other sufficient facts and circumstances. In criminal trials, the jury are charged with the ascertainment of the facts, and in doing so are permitted to draw all reasonable and satisfactory inferences: See *Rosenbaum v. State*, 33 Ala. 534, at the present term; the charge asserted a correct legal proposition: *Morgan v. State*, Id. 413, at the present term: *Ogletree v. State*, 28 Id. 693; *Roscoe's Cr. Ev.* 875; *McGehee v. Gindrat*, 20 Ala. 95; *Centre v. P. & M. Bank*, 22 Id. 743; *Burns v. Taylor*, 23 Id. 255; *Brewer v. Brewer*, 19 Id. 482; *Bradford v. Harper*, 25 Id. 337; *Garrett v. Lyle*, 27 Id. 586; *Regina v. Smith*, 33 Eng. L. & Eq. 531.

The record informs us that after the jury had been charged, and had retired, the court, having finished the business of the day, withdrew from the bench; and that the counsel for the prosecution and defense, having agreed that the clerk might receive the verdict, left the court-room; that subsequently the jury having sent for the judge, he, in answer to a written request by them, gave them the charge which we have been considering. This, we are informed by the record, was done in the court-room, and in the presence of the prisoner, but "in the absence and without the knowledge or consent of the counsel for the accused." This matter is here assigned for error.

It will be observed that the only ground of exception to this action of the court is that it was done in the absence of the counsel, and without his knowledge and consent. Construing this language literally, it does not affirm that the counsel was not called or sent for. In laying down a rule for the government of cases such as this, we can only assert principles which

will apply alike to all cases similarly circumstanced. Counsel might be beyond the reach of the court, or, it is conceivable, may abandon the defense. We find nothing in this record which affirms such to have been this case; yet the record does not show that the prisoner's counsel could have been brought to the court when the jury desired further instructions. To deny to the court, in general terms, the right to give to the jury further or explanatory charges in the absence of the counsel might leave the court, the jury, and the administration of the criminal law at the mercy of persons over whose movements the court could exert no control, or within the arbitrament of accidents against which no human vigilance could provide. To lay down such a rule might lead to the most embarrassing results; and in cases not without the pale of supposition, might result in a total denial of justice.

While we concede the unqualified right of the accused "to be heard by himself and counsel;" that this right extends beyond the examination of witnesses, the discussions of law, and the testimony, and embraces every important order made, or proceeding had; still we think that in the mere incidents or accidents of the trial something must be conceded to the exercise of a just and enlightened judicial discretion. In giving a new or explanatory charge, or in repeating a former charge, courts should, and doubtless would, give counsel the privilege of being present, by having them called, or, if within reach, sent for. We think, however, that when counsel have voluntarily absented themselves from the court-room, under an agreement that the clerk may receive the verdict, it is not an error for which we should reverse that the court afterwards, the prisoner being present, at the instance and request of the jury, gave them a charge which is unexceptionable as a legal proposition, merely because this was done in the absence and without the knowledge or consent of the prisoner's counsel.

We need not, and do not, announce what would be our opinion if the record informed us that the counsel, on leaving the court-room, requested to be called or notified should further action in the case become necessary, or that the counsel were within reach and were not called. That case is not presented by this record, nor is it probable it will arise.

The judgment of the city court is affirmed, and its sentence must be executed.

STEWART v. STOKES.

[33 ALABAMA, 494.]

POWER OF SHERIFF UNDER FIERI FACIAS TO SELL LAND, receive purchase-money, indorse sale, receipt for purchase-money, and execute conveyance to purchaser is not a mere naked power, but a power coupled with a trust.

IT IS SHERIFF'S TRUST AND DUTY, given to him by law, to execute conveyance under *feri facias* when purchase-money is paid.

EQUITY WILL INTERPOSE AND GRANT EQUITABLE RELIEF in all cases where trusts, or powers in nature of trusts, are required to be executed by trustee in favor of particular persons, and they fail in being so executed by casualty or accident.

WHERE PURCHASE-MONEY HAS BEEN PAID TO SHERIFF, and he dies before execution of a conveyance, equity will grant relief, regarding it as a case of casualty or accident.

COURTS OF EQUITY WILL NOT GRANT RELIEF to party upon the ground of accident, where the accident has arisen from one's own gross negligence or fault.

SUIT IN EQUITY IS PROPER FORM OF ACTION TO ENFORCE CONVEYANCE OF REAL ESTATE to purchaser under sheriff's sale, where purchase-money has been paid, and sheriff has died before executing a conveyance.

BILL in equity to enforce divestiture of title. John Stokes held a tract of land under a United States patent. Willis B. Stokes, his son, afterwards purchased this property under sheriff's sale, but before a conveyance was executed to him, the sheriff died. Willis B. Stokes subsequently sold the same to Charles Stewart, the complainant herein, and executed a conveyance to him. Stewart brings suit to divest John Stokes of the legal title to the land, and to enjoin him from cutting and hauling any timber therefrom.

Webb and Inge, for the appellant.

S. F. Hale, contra.

By Court, RICE, C. J. The power of the sheriff in this state, under *feri facias*, to sell land, receive the purchase-money, indorse the sale and receipt of the purchase-money on the *feri facias*, and execute a conveyance to the purchaser is not a mere naked power, but a power coupled with a trust. It is a power which it is the duty of the sheriff to execute—made his duty by law, which has given him an interest extensive enough to enable him to discharge it. It is not given to him as a mere power, but as a trust and duty which he ought to fulfill; “and his omission to do so, by accident or design, ought not to disappoint” the object for which the power in the nature of a trust was conferred by the law. This case is its nature similar to that class of cases “where trusts, or powers in the nature of trusts, are required to be executed by the trustee in favor of

particular persons, and they fail of being so executed by casualty or accident. In all such cases, as stated by Judge Story, equity will interpose and grant equitable relief:" 1 Story's Eq. Jur., sec. 98; *Gibbs v. Marsh*, 2 Met. 243; *Withers v. Yeadon*, 1 Rich. Eq. 325; *Osgood v. Franklin*, 2 Johns. Ch. 1 [7 Am. Dec. 513].

Where the sheriff has made the sale, received the purchase-money at the time, and duly returned the *fiery facias* with the sale and receipt of the purchase-money properly indorsed thereon, the trust does not become extinct by the death of the sheriff before he executed a conveyance to the purchaser. The purchaser being in such a case entitled to a conveyance from the sheriff at the time the sheriff died, his death is a casualty or accident against which a court of equity can relieve.

The general rule is fully admitted that courts of equity will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault. But that general rule cannot control the present case: 1. Because the duty of the sheriff to execute the conveyance was not "created by the party" by any positive contract or obligation, but was "created by law:" 1 Story's Eq. Jur., sec. 101; 2. Because the delay in the execution of the deed until the sheriff's death was accompanied by acts of ownership over the land, and claim of ownership by the purchaser at sheriff's sale under his purchase, and the aforesaid delay and acts and claim of ownership were known to and acquiesced in by the defendant in the *fiery facias*: *Waters v. Travis*, 9 Johns. 450; and 3. Because the defendant in the *fiery facias* remained silent after the sheriff's sale until long after his son (who was the purchaser at that sale) had, after acts of ownership, sold the land to the complainant, and put him in the control of it, and had removed from the state with all his property. It seems to us that the bill shows that the complainant has a clear right to have the title to the land divested out of the defendant in the *fiery facias*, the respondent in this case, and invested in himself; that this right cannot be enforced in a suitable manner, otherwise than by a suit like this; that the complainant has a superior equity to the party from whom he seeks relief, and that he will be subjected to an unjustifiable loss, without any blame or misconduct on his part, unless relief is granted in this case: 1 Story's Eq. Jur., sec. 109.

The decree of the chancellor is erroneous, and is reversed; and the cause is remanded. The appellee must pay the costs of the appeal.

DONALD v. HEWITT.

[33 ALABAMA, 534.]

PREFERENCE GIVEN BY FOREIGN STATUTE cannot operate to defeat liens acquired by virtue of attachments and libels in this state before it was set up.

PRIVITY OR LIEN GIVEN BY FOREIGN STATUTE is a matter of personal privilege rather than a matter of contract.

JUST "COMITY" REQUIRES THAT CONTRACT SHOULD BE EXPOUNDED and its obligations ascertained according to the law of the country where it is made.

PRINCIPLE OF "COMITY" BETWEEN FOREIGN STATES does not extend to recognition of liens given by foreign law, when it would operate prejudicially to the rights of others in the country where such lien is asserted.

LIENS GIVEN BY STATUTE IN ONE COUNTRY upon movables have no superiority to liens subsequently acquired in another country to which the movables are carried.

THERE ARE GOOD REASONS WHY MARITIME LIENS SHOULD HAVE THEIR SUPERIORITY RECOGNIZED OVER DOMESTIC LIENS.

SOUND PUBLIC POLICY DOES NOT REQUIRE THAT LIENS UPON BOATS NAVIGATING OUR INLAND RIVERS should have conceded to them a priority over other liens acquired in other states to which they may have been taken.

COMMON-LAW LIENS ARE MERE RIGHTS TO RETAIN PROPERTY until the specific debt is satisfied, and cannot continue without possession.

LIEN, UNDER OUR LAWS, has more extended signification than at common law.

TERM "LIEN" IS NOW USED TO DESIGNATE ALL VARIOUS CHARGES OF DEBTS UPON LAND OR PERSONALTY, created by statute or recognized in chancery and maritime law, although neither connected with nor dependent upon possession.

TERM "LIEN," IN COURTS OF EQUITY, IS USED TO DENOTE CHARGE OR INCUMBRANCE ON THING, where there is neither *jus in re* nor *jus ad rem*, nor possession of the thing.

TERM "LIEN" INCLUDES EQUITABLE MORTGAGE.

LIEN CREATED BY CONTRACT FOR SECURITY OF DEBT without possession of the goods has every characteristic of an equitable mortgage, and may be properly so denominated.

EVERY AGREEMENT FOR LIEN OR CHARGE IN REM CONSTITUTES TRUST, and is governed by the doctrine of trusts.

EVERY AGREEMENT FOR LIEN OR CHARGE IN REM IS CALLED EQUITABLE MORTGAGE, because courts of chancery, regarding them as trusts to be enforced, attach to them the incidents of a mortgage.

AGREEMENT THAT BILLS SHALL BE PAID OUT OF PROCEEDS OF CERTAIN PROPERTY CREATES EQUITABLE MORTGAGE.

CHARGE OF EQUITABLE MORTGAGE, like other equities, is maintainable except against innocent purchasers for value without notice.

NON-CONFORMITY OF SECURITIES GIVEN TO THOSE CONTEMPLATED IN CONTRACT, and the blending in the same securities of an additional amount or debt to that for which the contract provided a lien would not destroy the lien so provided.

ONE PARTNER HAS RIGHT TO INCUMBER ENTIRE INTEREST IN PERSONAL PROPERTY OF PARTNERSHIP for the security of the debts.

MERE FACT THAT TWO PARTIES OWN CERTAIN INTERESTS IN BOAT DOES NOT OF ITSELF CONSTITUTE THEM PARTNERS.

THERE MAY BE JOINT PROPERTY IN STEAMBOAT without the existence of a partnership.

LIEN GIVEN BY CONTRACT CANNOT BE ENLARGED SO AS TO SECURE ADDITIONAL INDEBTEDNESS, upon the ground that it was thus verbally agreed or understood.

INDORSEMENT UPON ENROLLMENT OF BOAT is simply made for the purpose of giving notice of a pre-existing statutory lien, and is not designed to evidence the declaration of a new trust.

BILL in equity to enforce foreign lien on steamboat. The facts necessary to understand the decision are stated in the opinion.

J. A. Elmore and T. H. Watts, for the appellants.

Goldthwaite and Semple, contra.

By Court, R. W. WALKER, J. The complainants in the original bill, Schnetz & Hewitt, and Thomas Moore, one of the respondents, at Louisville, in the state of Kentucky, made a written contract under seal, whereby the former agreed to make an engine and put it on board of a certain boat, and the latter agreed to pay therefor three thousand four hundred dollars during the progress of the work, and besides, to give three "notes or acceptances" for equal amounts, making together the sum of three thousand four hundred dollars. The writing concludes with a stipulation that for the better security of the payment "of the said notes," Schnetz & Hewitt were to retain a special lien on said boat and engine until "the notes" were paid. Moore paid three thousand four hundred dollars during the progress of the work, and accepted six bills of exchange for amounts together exceeding three thousand four hundred dollars. The boat, having been brought to Montgomery, in this state, was attached and libeled by creditors of Moore & Jackman, the owners of the boat. The bill asserts for the complainants a prior lien upon the boat, and is designed to enforce that lien.

An attempt is made to sustain the complainants' claim to a prior lien under a statute of the state of Kentucky, where the contract was made and the indebtedness to complainants was incurred. By that statute, steamboats built, repaired, and equipped in the state are made liable for all debts contracted by the master, owner, or consignee thereof on account of work, supplies, or materials furnished towards the building, repair

ing, fitting, furnishing, or equipping such steamboats, their engines, etc.; and a preference over all other debts, except for the wages of the officers and crew, is given. By the same statute it is provided that the "lien given by the act" is invalid against a purchaser without notice, unless suit be commenced within twelve months; but that a notice of the lien, indorsed upon or attached to the enrollment of the vessel, shall operate as actual notice. The preference given by the Kentucky statute cannot operate to defeat liens acquired by virtue of attachments and libels in this state before it was set up. This priority or lien given by the Kentucky statute is not a matter of contract. "It is extrinsic, and is rather a matter of personal privilege," given by the *lex loci contractus*: *Harrison v. Sterry*, 5 Cranch, 298, 299. The just "comity" which is recognized in the law requires that a contract should be expounded and its obligations ascertained according to the law of the country where it is made. But this principle does not extend to a recognition of liens given by the foreign law, when it would operate prejudicially to the rights of others in the country where such lien is asserted. The liens given by the statute in one country upon movables have no superiority to liens subsequently acquired in another country to which those movables are carried. In support of this proposition, we cite authorities which sustain it: Story's Conf. L., secs. 323-325, 325 a, 325 b, 325 c; *Lee v. Creditors*, 2 La. Ann. 599; *Noble v. Steamboat St. Anthony*, 12 Mo. 262; *Harrison v. Sterry*, *supra*; *Goodsill v. Brig St. Louis*, 16 Ohio, 178; *Smith v. Union Bank*, 5 Pet. 518; *McMahan v. Green*, 12 Ala. 71; *Merrick & Fenno v. Avery, Wayne, & Co.*, 14 Ark. 370.

A different rule may apply in reference to maritime liens existing by virtue of the general maritime law. There are, doubtless, reasons why such liens should have their superiority recognized, which do not apply to domestic liens. The law which gives them existence is common to most, if not all, commercial countries; and the necessities of maritime commerce seem necessarily to require a precedence for its liens: Story's Conf. L., sec. 402. A sound public policy does not require that liens, such as those springing up under the Kentucky statute, upon boats navigating our inland rivers, should have conceded to them a priority over other liens, which may be acquired in other states to which they may be carried. Steamboats might be covered up, if such priority was allowed, by antecedent liens, of which there was no notice; and great in-

justice might be done to those who trusted the boat upon the assumption of its liability; and there would be great room for collusive arrangements to shelter the boat, by virtue of such liens, from just debts.

It is contended that the complainants have no lien by virtue of their contract. It is argued that the parties, in providing that Schnetz & Hewitt should retain a special lien, contemplated no other than the statutory lien. If this be so, the parties have done a vain and useless thing in bringing the subject of a lien into their contract. The language employed is appropriate to create a lien and to provide for its continuance. If the parties intended that the lien so held should exist by virtue of the statute of Kentucky, and not of the contract, they have not said so; nor have they said that which authorizes us to infer it.

We give effect to the words of the contract, and allow a motive to the parties in the use of them when we understand them as creating a lien; one to exist by virtue of, and to have effect determinable by, the contract. We adopt that view of the question, and thus avoid the necessity of considering what would be the rights of the parties, if there were no other lien than that given by the statute of Kentucky.

It is contended for appellants that the well-ascertained technical meaning of the word "lien" is a right to retain possession of property until a demand is satisfied, and that it must be so understood where it occurs in the written contract above named. It is true that common-law liens—for example, liens of carriers, innkeepers, factors, and artificers—are mere rights to retain until the specific debt is satisfied, and cannot continue without possession. But whatever may be the import of the word, when applied to that class of cases, or whatever may have been its original meaning, it has acquired in our law a much more extended signification. It is used to designate all the various charges of debts upon land or personalty which are created by statute, or recognized in chancery and maritime law, although neither connected with nor dependent upon possession: Willard's Eq. Jur. 123. Thus we have the lien of a judgment, the lien of an execution, the lien of a partner, the lien of a legal or equitable mortgage, the lien of a vendor, and various other charges which are denominated liens; and in courts of equity, the term "lien" is used to denote a charge or incumbrance on a thing where there is neither *jus in re* nor *jus ad rem*, nor possession of the thing: *Peck v. Jonness*, 7 How. 612, 619; *Brig Nestor*, 1 Sumn. 73.

The term "lien," having so comprehensive a signification, includes an equitable mortgage; and no perversion of its meaning will be involved in construing the written contract of the parties as an equitable mortgage.

The parties unquestionably had a right by contract to create a charge upon the boat, which would exist independent of the possession of the thing charged. The inquiry, unembarrassed by the technical meaning imputed to the word "lien," is whether they have done so.

A lien merely co-existent with the possession of the boat could not have been contemplated. The boat was not built by Schnetz & Hewitt. It does not seem to have been designed that it should ever go into their possession. The payments were to be made in four, six, and eight months. The contract provides that the lien was to continue until the debts were paid. It would be a most unreasonable inference that Schnetz & Hewitt were to retain the boat for eight months. That a steamboat should for eight months lie up, depreciating from natural decay, yielding no return for the heavy outlay in its construction, and probably requiring some expense to take care of it, would have been a most unreasonable exaction for Schnetz & Hewitt to make, or for Moore to grant. The loss from the delay would have been totally disproportioned to the interest upon the amount, or the value of the forbearance to collect it. These considerations prove, with satisfactory certainty, the intention to create a lien for the security of the debt, which would exist without possession by the creditor. Such a lien has every characteristic of an equitable mortgage, and may properly be so denominated. Every agreement for a lien or charge *in rem* constitutes a trust, and is accordingly governed by the general doctrine of trusts. Such a lien or charge is called an equitable mortgage, because courts of chancery, regarding them as trusts to be enforced, attach to them the incidents of a mortgage. Thus an agreement that bills should be paid out of the proceeds of certain property has been held to create an equitable mortgage: *Miller on Equitable Mortgages*, 8. An agreement, "pledging and hypothecating" property for the payment of certain bills, was enforced as an equitable mortgage: *Fletcher v. Morey*, 2 Story, 555. A contract that a party "should have and maintain a lien" on chattels was characterized as "in the nature of an equitable mortgage," and as such enforced: *Dunning v. Stearns*, 9 Barb. 630. And an unsealed instrument of writing, pledging the real and personal estate of a railroad

company for the faithful performance of a contract, was held by this court to be an equitable mortgage: *M. & C. P. R. R. Co. v. Talman*, 15 Ala. 473; see also *Whitworth v. Gaugain*, 3 Hare, 416; *Campbell v. Worthington*, 6 Vt. 448; *Bank of Kentucky v. Vance*, 4 Litt. 168; *Marshall v. Lewis*, Id. 140; *In re Howe*, 1 Paige, 125 [19 Am. Dec. 395]; *Abbot v. Godfroy*, 1 Mich. 178; *Coster v. Bank of Georgia*, 24 Ala. 87; *Kelly v. Payne*, 18 Id. 371.

The authorities cited upon the brief of the counsel for appellees show that the equitable mortgage created by the contract of Moore with Schnetz & Hewitt overrides the liens of the attaching and libeling creditors: See those cases; also Willard's Eq. Jur. 443; 2 Story's Eq. Jur. 655, sec. 1228; *Jenkins v. Bodley*, 1 Smed. & M. Ch. 338; *Dunlap v. Burnett*, 5 Smed. & M. 702. The charge of an equitable mortgage, like other equities, is maintainable except against innocent purchasers for value without notice. Perhaps the creditors who attach and libel the boat may be deemed purchasers for some purposes: *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866. But if purchasers, the consideration is the pre-existing indebtedness; and they do not fall within the rule which protects innocent purchasers for a valuable consideration without notice: *Boyd v. Beck*, 29 Id. 703. If, by contract, the creditors had obtained a lien for the security of their pre-existing debts, they would not be entitled to protection as purchasers for value: *Boyd v. Beck*, *supra*; *Dickerson v. Tillinghast*, 4 Paige, 214 [25 Am. Dec. 528]; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. 103 [18 Am. Dec. 577]; *Powell v. Jeffries*, 4 Soam. 387; *Rowan v. Adams*, 1 Smed. & M. Ch. 45. There is nothing in the nature of the lien given to the creditors in this case which can make their position more favorable, so far as this question is concerned, than it would have been had their lien been regularly created by contract: *Carter v. Champion*, 8 Conn. 549. The attaching creditor has a right to take what belongs to his debtor. In the absence of fraud, he stands as a volunteer in the place of the debtor: *Wanser v. Truly*, 17 How. 584; *Whitworth v. Gaugain*, 3 Hare, 416.

In this state, an unrecorded mortgage is postponed to the lien of a creditor without notice; but that results from our registration statutes, which can have no influence upon this case, because the suit was instituted within twelve months after the property was first brought to this state: Clay's Digest, 255, sec. 4. This point is conclusive of the inapplicability of the registration laws of Alabama to the case; and it is

therefore unnecessary for us to consider whether any of our registration laws embrace an instrument like this, creating an equitable mortgage, or whether a mortgage on a steamboat plying between New Orleans and Montgomery is within the operation of those statutes: See, however, *Fontaine & Denton, Beers*, 19 Ala. 722; *McCain v. Wood*, 4 Id. 258; *Falkner v. Jones*, 12 Id. 165; *Morgan v. Morgan*, 3 Stew. 383 [21 Am. Dec. 638]; *Bank of Kentucky v. Vance*, 4 Litt. 168.

The Kentucky registration law, which was pleaded, makes a "deed of mortgage, or deed of trust," void against creditors and purchasers for valuable consideration without notice, unless deposited for record as therein required. This law has been held in Kentucky not to include an equitable mortgage, which merely gives a charge upon property without conveying it; *Bank of Kentucky v. Vance*, 4 Litt. 174. We follow that decision here, because we approve the reasoning of it, although it has not been pleaded or given in evidence, and is therefore not binding upon us. As the Kentucky registration statute does not include the instrument which gives to the complainant their lien, it is unnecessary for us to pass upon any other objection to the defense attempted to be based upon the foreign registration laws.

The non-conformity of the securities given to those contemplated in the contract, and the blending in the same securities of an additional amount of debt to that for which the contract provided a lien, would not destroy the lien so provided: *Boyd v. Beck*, 29 Ala. 703; *Cullum v. Bank*, 23 Id. 797; *Hair v. Grigsby*, 18 Id. 44.

One partner has the right to incumber the entire interest in the personal property of the partnership for the security of its debts. It would, therefore, be no objection to the extension of the complainants' lien over the entire interest in the boat that the equitable mortgage was given by Moore alone, if a partnership existed between Moore and Jackman: Story on Part., sec. 94; *Tapley v. Butterfield*, 1 Met. 515 [35 Am. Dec. 374]; *Deckard's Case*, 5 Watts, 122; *Milton v. Mosher*, 7 Met. 244. But it nowhere appears from the original or amended bills that Moore and Jackman were partners, either in the ownership of the boat or in running it after it was built. The mere fact, that Moore owned a certain interest in the boat, and Jackman the remaining interest, does not, of itself, constitute them partners. There may be a joint property in a steamboat without the existence of a partnership. Unless a partnership existed, or

Moore had authority from Jackman to bind his interest, the lien given by the former could cover only the interest which he had in the boat. As neither a partnership nor an authority to Moore from Jackman is shown, the operation of complainants' lien must be confined to Moore's interest in the boat.

Our argument thus far shows, as we think, that Schnetz & Hewitt have a lien, by virtue of their contract of July, 1849, which they are entitled to enforce in this suit. But the sum for which a lien is given by that contract is limited to three thousand four hundred dollars. The debt of the complainants is much larger, and is shown by the proof to have become so in consequence of work done in addition to that prescribed by the contract. The lien given by the contract cannot be enlarged so as to secure this addition to the indebtedness, upon the ground that it was verbally agreed, or intended, or understood, when the additional work was done, that it should be so enlarged; or upon the ground that the additional indebtedness was contracted on the faith of the lien; for there is no averment in the original or amended bills of such facts. In the entire omission of any such averments, this case differs from *Fletcher v. Morey*, 2 Story, 555.

After the bills of exchange were given to secure the debt due Schnetz & Hewitt, Moore caused an indorsement upon the enrollment of the boat by the surveyor and inspector of the port of Louisville to be made as follows: "Messrs. Schnetz & Hewitt hold a lien on said boat to secure the payment of six drafts." etc., "and this indorsement to be continued on all enrollments issued for the boat until all the above drafts are fully paid, and Schnetz & Hewitt are fully satisfied." The amended bill alleges that Moore, by that memorandum, "acknowledged, admitted, declared, and gave a lien;" and the original bill says that he thereby "acknowledged and recognized the lien."

The majority of the court regard the declaration made by Moore to the surveyor and inspector of customs, and indorsed by his directions upon the enrollment of the vessel, upon the averments of the bill above stated, as a declaration of a trust in favor of Schnetz & Hewitt for the entire amount of debt secured by the drafts described in the indorsement upon the enrollment, which trust, they think, is valid in equity, and, being sustained by proof, must be upheld in this case. Taking all the circumstances alleged in the bill together, my opinion is that the indorsement upon the enrollment was simply made by Moore's direction for the purpose of giving notice of the pre-

existing statutory lien, and was not designed to evidence the declaration of any new trust. The authorities referred to on the brief of counsel show that such a declaration of trust as my brethren suppose was made will be sustained in equity.

The complainants in the cross-bill are entitled to no relief. The language indorsed upon the enrollment, in favor of the complainants in the cross-bill, which touches the subject of lien, is as follows: "The above obligation being given for materials and workmanship on the boat building, the mortgage or lien to continue on the boat papers as security," etc. If these words were regarded as giving a lien, it would be a lien "on the boat papers," which would be absurd. What is said about continuing the lien on the boat papers means nothing more than that the fact of the existence of the lien, given by the statute to the boat-builder should remain evidenced by an indorsement on the papers of the boat. Its object was merely to give notice that a lien existed by preserving a statement of that fact upon the papers of the boat.

The decree of the court below is reversed, and the cause remanded, that a decree may be rendered consistent with the foregoing opinion. The appellant must pay the costs of this court.

CONTRACTS, BY WHAT LAW GOVERNED: See *Kanaga v. Taylor*, 70 Am. Dec. 62, and note 66; *Lockwood v. Mitchell*, Id. 78, and note 84.

LIENS, DEFINITION, NATURE, AND EXTENT OF: See *Andrews v. Doe*, 38 Am. Dec. 450; *Grinnell v. Cook*, Id. 663, note 668; *Oakes v. More*, 41 Id. 379; *Miller v. Marston*, 56 Id. 694, and notes.

PARTNERS, RIGHTS CONCERNING FIRM PROPERTY, and rights and liens of creditors: See *Twinghurst v. Champlin*, 67 Id. 510, and note 541.

RHODES v. OTIS.

[33 ALABAMA, 578.]

WORD "NAVIGABLE" HAS TECHNICAL MEANING AT ENGLISH COMMON LAW, and is used to describe public rivers where the tide ebbs and flows.

ALL STREAMS BELOW TIDE-WATER ARE PRIMA FACIE PUBLIC.

ALL STREAMS ABOVE TIDE-WATER ARE PRIMA FACIE PRIVATE.

WHERE CREEK IS ABOVE TIDE-WATER, ONUS OF PROOF RESTS upon party claiming for it the character of a navigable stream.

IF STREAM BE USEFUL AS COMMON PASSAGE FOR OR BENEFICIAL TO PUBLIC, or of sufficient depth for valuable floatage, or sufficiently large to bear boats or barges, or be of public use in transportation of property, it has the characteristics of a navigable stream.

STREAM NEVER BEFORE USED FOR TRANSPORTATION, BUT USED IN SINGLE INSTANCE ONLY, for floating of lumber only six or seven miles, is not a navigable stream.

NO USE OF STREAM BY ONE PARTY ALONE, HOWEVER VALUABLE it may be to him, will make it a navigable stream, but public must be interested to constitute it as such.

WHERE THERE IS NO TENDENCY OF PROOF TO CONCLUSION FROM CONFLICTING EVIDENCE, it is certainly a right of the parties to have from the court a declaration of the legal effect of the evidence.

COURT IS NOT BOUND TO CHARGE JURY AS TO LEGAL EFFECT OF ENTIRE EVIDENCE, unless, after concession of all points upon which there was a conflict of evidence, the party asking the charge is entitled thereto.

LICENSE IS AUTHORITY TO DO PARTICULAR ACT OR SERIES OF ACTS, upon another's land, without possessing any estate therein.

PRIVILEGE OF FLOATING SPARS UPON PRIVATE STREAM, where it does not involve the holding or occupation of the real estate, is a license.

UNEKSCUTED PAROL LICENSES ARE GENERALLY REVOCABLE, even when based upon a valuable consideration.

IT IS AGAINST ALL CONSCIENCE TO PERMIT PARTY TO REVOKE HIS LICENSE after the other party has acted upon it so far that damage would result from the revocation.

ESTOPPEL IN PARS APPLIES WHERE PARTY WISHES TO REVOKE LICENSE to the great injury of the other party to the license.

ACTION to recover damages for obstruction of watercourse, by William Otis against James Rhodes. Complainant averred that Rhodes is the owner of a large tract of land lying on both sides of Bashi creek. That on the twenty-second of March, 1854, for the sum of twenty-five dollars, Rhodes agreed to allow plaintiff the privilege of floating down and landing at several places on said creek certain lumber in raft form, which he had felled farther up the stream beyond defendant's land. Pursuant to agreement, plaintiff attempted to float his timber down the stream, but was thwarted and prevented in every manner by defendant, so that his timber, valued at fifteen thousand dollars, was stranded, became rotten, and was completely lost. Defendant demurred on several grounds; among others, that it was impossible to determine from the complaint whether the action was founded on tort or on contract; and incidentally the question arose as to whether or not Bashi creek might be considered a navigable stream. Conflicting testimony was introduced which went to prove that the creek was not used by the public generally, for any purpose, and that it had been found useful to the plaintiff in this instance alone and for this purpose only. The opinion states the further facts.

- William G. Jones, for the appellant.

A. R. Manning, contra.

By Court, A. J. WALKER, C. J. The word "navigable" has, in the English common law, a technical meaning, and is used to describe public rivers where the tide ebbs and flows: Angell on Watercourses, 604, sec. 542; 3 Kent's Com. 512; *Stuart v. Clarke*, 2 Swan, 9 [58 Am. Dec. 49]; *Scott v. Willson*, 3 N. H. 821; *Morgan v. Reading*, 3 Smed. & M. 366; *Commissioners v. Withers*, 29 Miss. 21 [64 Am. Dec. 126]; *Ex parte Jennings*, 6 Cow. 518 [16 Am. Dec. 447].

The charges given and refused in this case manifestly used the word "navigable" in its common, and not in its technical, acceptation; and in that sense we will understand it for the purposes of this opinion.

It is undoubtedly true, as held by this court in *Ellis v. Carey*, 80 Ala. 725, that all streams below tide-water are *prima facie* public; and all above tide-water are *prima facie* private, not subject to a public right of floatage upon them: *King v. Montague*, 4 Barn. & Cress. 598; Angell on Watercourses, 596, sec. 535; *Mayor of Colchester v. Brooke*, 7 Ad. & El., N. S., 339; 53 Eng. Com. L. 339; *Miles v. Rose*, 5 Taunt. 705; 1 Eng. Com. L. 240; *Wadsworth v. Smith*, 11 Me. 278; *Morgan v. King*, 18 Barb. 277.

Bashi creek, being above tide-water, is *prima facie* not a navigable stream. The *onus* of proof was, therefore, upon the party claiming for it the character of a navigable stream.

It is difficult, perhaps impossible, to define with precision the fresh-water streams which are public, or, in the common acceptation of the term, navigable. A reference to the decisions will aid us in ascertaining the principles upon which the question is to be decided, as to the creek mentioned in the bill of exceptions in this case.

The test laid down in *People v. Platt*, 17 Johns. 211 [8 Am. Dec. 382], of a fresh-water stream in which the public have an easement for purposes of transportation and commercial intercourse, is their susceptibility of use as a common passage for the public. The navigability of the Hudson at Stillwater is placed upon the ground that it was, beneficially to the public, subservient of rafting: *Palmer v. Mulligan*, 3 Cai. 318 [2 Am. Dec. 270]. Lord Hale describes navigable streams as of sufficient depth for valuable floatage: Angell on Watercourses, 596, sec. 535. In *Wadsworth v. Smith*, 11 Me. 278 [26 Am. Dec. 525], it is said those streams which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right.

The South Carolina court, while declining to define a navigable stream, said that that would not be a navigable stream the natural obstructions of which prevented the passage of any boats whatever: *Cates v. Wadlington*, 1 McCord, 583 [10 Am. Dec. 699]; see *Wilson v. Forbes*, 2 Dev. L. 30; *Ingram v. Threadgill*, 3 Id. 61. In Tennessee it is held that the public have an easement in shallow streams, which are of sufficient depth for valuable floatage, as for rafts, flat-boats, and perhaps small vessels of lighter draught than ordinary: *Stuart v. Clarke*, 2 Swan, 16 [58 Am. Dec. 49]; *Elder v. Burrus*, 6 Humph. 364.

The language of the decision in *Munson v. Hungerford*, 6 Barb. 370, is: "A stream to be navigable within the authorities must furnish a common passage for the king's people; must be of common or public use for carriage of boats or lighters; must be capable of bearing up and floating vessels for the transportation of property, conducted by the agency of man. It is not enough that a stream is capable (during a period in the aggregate of from two to four weeks in the year, when it is swollen by the spring and autumnal freshets) of carrying down its rapid course whatever may have been thrown upon its angry waters, to be borne at random over every impediment, in the shape of dams or bridges, which the hand of man has erected. To call such a stream navigable is a palpable misapplication of the term."

It is intimated, though not decided, in *Brown v. Scofield*, 8 Barb. 239, that the courts will take judicial notice of such streams as are public highways; and in determining whether the Carristo river is navigable, stress is laid upon the fact that it had been used as a highway since the settlement of the country; and the remark is made "that these great natural channels and avenues of commerce, whenever they are found of sufficient depth to float the products of the mines, the forests, or the tillage of the country through which they flow to market, have always been adjudged by our courts to be subject to the right of passage, independent of legislation."

The question in *Curtis v. Keesler*, 14 Barb. 511, was whether Calikoon creek was a navigable stream. The proof was that the tide did not ebb and flow in the stream; that in its natural state it was not capable of floating a log; that when swollen by freshets or the melting of snow it would bear up a raft or single logs of timber; that it had been occasionally used for many years by a few persons. Declaring that a stream to be navigable must be a common passage for the king's people,

must be of public use for carriage of boats and lighters, must be capable of bearing up and floating vessels for the transportation of property, conducted by the agency of man, the court held that the stream was not navigable.

In *Morgan v. King*, 18 Barb. 277, it was decided that a stream might be public, although useful only to float single logs without manual guidance; and that a stream upon which and its tributaries saw-logs, to an unlimited amount, would be floated every spring, and for a period of from four to eight weeks, and for the distance of a hundred and fifty miles, and upon which unquestionably many thousands would be annually transported for many years to come, has the character of a public stream for that purpose: See also *Brown v. Chadbourne*, 81 Me. 9 [50 Am. Dec. 641]; *Moor v. Veasie*, 32 Id. 843 [52 Am. Dec. 655].

Morgan v. King, *supra*, presented a peculiar case, where the immense forests of valuable timber, contiguous for a great distance to the stream which flowed along the great slope from the south towards the St. Lawrence, made the creek the means of transportation for the marketable product of the labor and enterprise of a great number of people throughout a large extent of country. The number of people interested in the use of the stream for a particular purpose, the magnitude of the public interests involved, and the fitness of the stream for the carriage of the peculiar article of commerce of a large section of country, were controlling elements in that case.

Rowe v. Granite Bridge Corporation, 21 Pick. 344, decides that a creek below tide-water would not be public unless it was "navigable to some purpose useful to trade and agriculture."

The length of time for which an appropriation to public use has existed is prescribed as one of the tests, though certainly not a controlling one, of a navigable stream: Woolrych on Waters, 40; *Shaw v. Crawford*, 10 Johns. 236. Force is given, in most of the cases, to the consideration that the stream had or had not been long used for public purposes: *King v. Montague*, 4 Barn. & Cress. 598. This consideration is entitled to less weight in a new than in an old country; but the country through which the creek, upon the character of which we are passing, flows, is not so new as to make it unimportant.

Another inquiry, which is of some importance in testing the character of a stream, is whether it was omitted from the government surveys: *Ellis v. Carey*, 30 Ala. 725.

From the somewhat conflicting authorities which we have examined, we attain the conclusion that in determining the

character of a stream, inquiry should be made as to the following points: Whether it is fitted for valuable floatage; whether the public, or only a few individuals, are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used; whether it was meandered by the government surveyors, or included in the surveys; whether, if declared public, it will probably in future be of public use for carriage. And in the application of these inquiries to the facts of a case, it is to be remembered that the *onus probandi* is upon the party claiming that a stream above tide-water is public.

Applying the tests above indicated to this case, we decide that Bashi creek is not a navigable stream. There is no proof that Bashi creek can be used for any purpose, save the floating of timber. There was no proof that the creek could be used, even for that purpose, for a greater distance than about six or seven miles in a direct line. It had never been used before by any person for transportation in any way. It has never been used since by any person for that purpose. It is not shown that there are large and extensive forests, fitted to afford timber for market, contiguous to the stream; nor is it shown that any great business of transporting timber on it can ever spring up. It does not appear that the public generally, or any large number of persons, will ever use the stream for such purpose. Indeed, the short distance to which the stream can be used affords a strong argument that no large number of persons will probably ever use it for floating timber. The stream, even below the mouth of Tallahatta creek, can only be used for floatage in freshets from head-water, or from backwater from the Tombeckbe river. In case of freshets from head-water, it can be used for floating rafts only for a very short time; because the creek, being a short one, runs down very soon. The seasons being unusually dry, it was impracticable, from the spring of 1854 to some time in the winter of 1856, to float spars out of the creek; thus showing that for long periods of time it is totally useless, even to float logs. The highest estimate of the aggregate of the brief periods when it might be used for the short distance for floating rafts and logs, on account of freshets and backwater, is three months. The creek is not shown to have been excepted from the government surveys. Upon such evi-

dence, it cannot be held that Bashi creek is a navigable stream. It is not sufficient to show that a contingency has arisen, or may arise, in which a particular individual can use the stream for a valuable purpose. The public must be interested before it can become a public highway.

The holding such streams to be public highways would be productive of great and extensive injury to individuals and the public. A large number of creeks in the state, never thought of as navigable streams, might be used for floating rafts for as long a time in each year, and perhaps for a greater distance, if advantage were taken of every rise, however short in duration. Every mill-dam on any of those creeks, every bridge over them, every water-gap, and every foot-log could be treated as a nuisance, at the option of any individual who might think proper to go up the stream and prepare a raft of timber to await a rise from a freshet to float his raft down; and he might sue the owners of mills for all damage sustained in consequence of the interference of the dams. To regard such streams as navigable could subserve no useful public purpose, and might prove detrimental to the great manufacturing interests of the state as well as to the public interest in having suitable bridges on the public roads: *Moffett v. Brewer*, 1 Iowa, 348; *Varick v. Smith*, 9 Paige, 553; *K. M. I. Co. v. Jenks*, 5 Ind. 103.

When the facts are ascertained, the question whether the stream is a public highway is a question of law: *Morgan v. King*, 18 Barb. 285. Making every intendment in favor of the plaintiff which would be proper on a demurrer to evidence, we think the law pronounces the judgment that Bashi creek was not a navigable stream; and we decide, therefore, that the court below erred in refusing to charge the jury that upon the evidence in this case the creek was not a navigable stream.

There is no tendency of proof to the conclusion that the floatage upon the stream has ever been, is now, or ever can be valuable to the public generally; and while the proof may be conflicting in its description of the stream, there is no conflict as to facts indispensably necessary to make it a navigable stream. In such a case, it is certainly a right of the parties to have from the court a declaration of the legal effect of the evidence, unless some sufficient legal reason for not giving it exists: *Knapp v. McBride*, 7 Ala. 29; *Hollingsworth v. Martin*, 23 Id. 597; *Swift v. Fitzhugh*, 9 Port. 67; *Skinner v. State*, 30 Ala. 526; *Knight v. Bell*, 22 Id. 206; *Woolfork v. Sullivan*, 23 Id. 558; *Powell v. State*, 27 Id. 52; *Crum v. Williams*, 29 Id. 446.

But the court cannot be required by a party to charge the jury as to the legal effect of the entire evidence, unless, after the concession of all points upon which there was a conflict of evidence, and of all adverse inferences from the evidence, he is entitled to the charge. We do not deny that no error could be predicated of a refusal by the court to charge the jury, as to oral testimony, that there was no evidence of any particular fact, because the presiding judge did not remember whether there was or not: *Knox v. Fair*, 17 Ala. 503; *Lancaster County Bank v. Allbright*, 21 Pa. St. 228. Whether a presiding judge could legally excuse himself for the omission to give such a charge, upon the ground that he did not remember the evidence, it is not necessary for us to decide, because no such ground of refusal was assumed in this case, and the legitimate inference from the bill of exceptions is, that its refusal was a rejection of the legal proposition involved.

The plaintiff in this case claims damages, not only upon the ground that Bashi creek was a navigable stream, but that he had a right resulting from contract to float his spars down it. It is a debated point between the counsel, whether the contract that the plaintiff might float his spars through the lands of the defendant was a mere license, or the transfer of an interest in land, within the statute of frauds. A license is defined by Kent to be an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein: 3 Kent's Com. 592; *Riddle v. Brown*, 20 Ala. 412 [56 Am. Dec. 202]. The distinction between an easement, within the statute of frauds, and a license, is sometimes difficult of discernment; but there can be no doubt that the privilege of floating the plaintiff's spars upon a private stream of the defendant, which does not involve the holding or occupation of the real estate, is within the definition of a license. Indeed, the books abound in cases where privileges on land of a much more fixed and lasting character have been held to be mere licenses: *Wood v. Ledbetter*, 18 Me. & W. 838; *Browne on Statute of Frauds*, 80, secs. 27, 28; 2 Platt on Leases, 23; *Dubois v. Kelly*, 10 Barb. 496; *Cook v. Stearns*, 11 Mass. 537; *Davis v. Townsend*, 10 Barb. 334; *Jamison v. Milleman*, 8 Duer, 255; *Wilson v. Chalfant*, 15 Ohio, 248 [45 Am. Dec. 574]; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; *Rerick v. Kern*, 14 Id. 267 [16 Am. Dec. 497]; *Angell on Watercourses*, c. 8.

It is true that parol licenses, unexecuted, are generally, though not universally, held to be revocable, even when they

are made upon a valuable consideration. The question in this case is not whether the license was revocable before it was acted on; it is whether the license can be revoked after it had been obtained for a valuable consideration, and the plaintiff, acting under it, had conveyed his spars to the creek, and placed them in it, ready to be carried down the stream by the anticipated rise, when the revocation would work great injury to the plaintiff, and when the exercise of the authority conferred would involve no occupancy of the defendant's land. There are, we admit, some authorities which would allow a revocation of the license, even under these circumstances; but we are not willing to follow them. It would be against all conscience to permit the defendant to revoke his license after the plaintiff had acted upon it so far that great damage must necessarily result from the revocation. Every reason upon which the doctrine of estoppels *in pais* rests applies. It is a plain case where one party has, by his conduct, induced another to act in such a manner that he cannot be allowed to retract without serious injury to that other person. We think a denial of the right of revocation, under such circumstances, is consistent with justice and right, supported by the analogies of the law, and many respectable decisions: *Rerick v. Kern*, 14 Serg. & R. 267 [16 Am. Dec. 497]; *Nettleton v. Sikes*, 8 Met. 84; Angell on Watercourses, div. 5, c. 8; *Hall v. Chaffee*, 18 Vt. 150; *Bridges v. Purcell*, 1 Dev. & B. 492; *Scheffield v. Collier*, 8 Ga. 82; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241.

We think, upon the averments in the declaration, Bashi creek would be a navigable stream. The complaint contains, therefore, a cause of action predicated upon an alleged interference with and obstruction of the plaintiff's right to navigate a public stream. This cause of action is in trespass on the case. The complaint also contains a cause of action for an infringement by the defendant of the plaintiff's right growing out of a contract with the defendant, and a breach of the defendant's duty under that contract. This was also a cause of action in case: *Myers v. Gilbert*, 18 Ala. 467; *Wilkinson v. Mosely*, Id. 288. The declaration, therefore, contains two complete causes of action.

The judgment of the court below is reversed, and the cause remanded.

NAVIGABLE STREAMS, WHAT CONSTITUTE: See *Stuart v. Clarke*, 58 Am. Dec. 429, and note; *Commissioners v. Withers*, 64 Id. 126; *Porter v. Allen*, 65 Id. 750, and note 754.

RIGHT TO FLOAT LOGS IN STREAM: See *Treat v. Lord*, 66 Am. Dec. 298, and note 295.

LICENSE, WHAT CONSTITUTES: See *Riddle v. Brown*, 56 Am. Dec. 202, and note 206; when and how far revocable: *Hazleton v. Putnam*, 54 Id. 158, and note 166, 167.

MOORE v. APPLETON.

[24 ALABAMA, 147.]

EXECUTION AND LEGALITY OF BILL OF EXCEPTIONS MUST BE TESTED by the law in force at the commencement of the suit.

BREACH OF IMPLIED PROMISE OF INDEMNITY AGAINST LOSSES SUSTAINED BY AGENT in the scope of his agency is sufficiently averred by an averment that the principal had notice of the losses and damages sustained by the agent and set forth in the declaration, and failed to pay the same.

PLEA THAT "PLAINTIFF DID NOT NOTIFY DEFENDANT" fails to negative notice to the defendant.

JUDGMENT AGAINST PRINCIPAL AND AGENT IN FAVOR OF OWNER OF CHATTELS tortiously taken by the agent under command of the principal is conclusive upon the principal as to the ownership of the property in an action by the agent against the principal upon the implied promise of indemnity

ACTION by Appleton against Moore to recover damages sustained from acts done in the capacity of agent for the defendant. The first declaration contained two counts, both of which were held defective on error: *Moore v. Appleton*, 26 Ala. 633. In that case, however, it was determined that the plaintiff had a right of action. It was there decided that when an agent is employed by his principal to do an act which is not manifestly illegal and which he does not know to be wrong, such as to take chattels, which, although claimed adversely by another, he has reasonable ground to believe belong to his principal, the law implies a promise of indemnity by the principal for such losses and damages as flow directly and immediately from the execution of the agency; and on such implied promise case and *assumpsit* are equally maintainable, but in both forms of action the declaration must allege a breach. After the cause was remanded, the plaintiff filed an amended second count, stating that he had been appointed by the defendant as his general and special agent, and while acting in that capacity, he, together with the defendant and at the latter's request, took possession of certain chattels; that at the time he did not know that the taking was tortious, but acted in good faith as the defendant's agent, and upon the faith of his representations that the taking

was lawful; that afterwards one Aaron B. Quinby, in a suit against the plaintiff, recovered a judgment for two hundred dollars damages for the taking, which was collected from the plaintiff under execution, and that the plaintiff was put to an additional expense of two hundred dollars for attorney fees and other expenses incident to the litigation of the suit. "And plaintiff avers that said defendant had due notice of the rendition of said judgment and the collection thereof from plaintiff, and that said judgment and payment were on account of said taking, and of all the other losses and damages sustained by plaintiff, as above set forth, and failed and refused to pay the same, or any part thereof, by means whereof the plaintiff has been injured," etc. The defendant's demurrer to this count having been overruled, he pleaded: 1. The general issue; 2. "That plaintiff did not, before the institution of this suit, notify defendant that he (plaintiff) had been compelled by legal process or otherwise to satisfy any part of the judgment recovered by said Quinby against him, nor did he ever demand of said defendant before the institution of this suit the amount which he now says he has paid;" 3. "That the goods and chattels in plaintiff's declaration mentioned, at the time when the same were taken in possession by plaintiff, were the property of this defendant." The court sustained a demurrer to the second and third pleas. The defendant assigns error to the overruling of the demurrer to the amended count and to the sustaining of the demurrers to his second and third pleas, and he also reserved a bill of exceptions to the rulings of the court upon the trial. Although it does not so appear from the pleadings, the judgment recovered by Quinby was against both the plaintiff and defendant.

D. P. Lewis, for the appellant.

R. W. Walker, *contra*.

By Court, STONE, J. This suit was commenced before the code went into operation, and hence the execution and legality of the bill of exceptions must be tested by the statute as it is found in Clay's Digest, 307, sec. 5. The paper found in this record, which is relied on as a bill of exceptions, has neither a seal nor scroll; and, under our former decisions, we cannot regard anything it contains: *Floyd v. Fountain*, 17 Ala. 700; *Godden v. Le Grand*, 28 Id. 158.

This reduces our investigations to very narrow limits.

The second count in the amended declaration strictly conforms to the decision of this court, pronounced when the case

was before us at a previous term: *Moore v. Appleton*, 26 Ala. 633. We there said: "An averment that the principal had notice of the losses and damages sustained by the agent, set forth in the declaration, and failed to pay the same, would be a good breach in such a case as this." This declaration contains that averment.

The second plea is defective in this, that while it fails to negative notice to the defendant, its object and aim are to cast on the plaintiff the new and additional burden of proving that he himself had given notice of the recovery and payment, or had demanded payment of the money before he instituted his suit. This is a palpable attempt to depart from our former decision, and, under our rules, cannot be tolerated: *Matthews, Finley, & Co. v. Sands & Co.*, 29 Ala. 136, and authorities cited.

The third plea is defective, and the demurrer to it was rightly sustained.

We have now disposed of all the questions which the state of the record authorizes us to consider.

Judgment of the circuit court affirmed.

R. W. WALKER, J., having been of counsel, did not sit in this case.

JUDGMENT OF COURT OF COMPETENT JURISDICTION IS CONCLUSIVE upon parties and privies upon matters adjudicated therein: *Ellis v. Clark*, 70 Am. Dec. 603, and cases cited in the note 605; *Grassmeyer v. Besson*, Id. 309, note 814; *Detrick v. Migatt*, 68 Id. 584; with respect to ownership of property: *Thomason v. Odum*, Id. 159.

INDEMNITY AND CONTRIBUTION BETWEEN WRONG-DOERS: See note to *Kirkwood v. Miller*, ante, p. 134.

JOHNSON v. LIGHTSEY.

[34 ALABAMA, 169.]

ERROR MUST BE APPARENT FROM BILL OF EXCEPTION.

ADMISSION OF EVIDENCE WHICH MIGHT HAVE BEEN RELEVANT TO QUESTION INVOLVED is not error unless the bill of exceptions negatives the existence of circumstances making it relevant.

ON QUESTION OF NEGLIGENCE OF CARRIER, HE MAY SHOW THAT DELAY IN TRANSPORTATION had been consented to by the shipper before the commencement of the voyage.

CARRIER MAY SHOW THAT IT WAS CUSTOMARY FOR TWO FLAT-BOATS laden with cotton to descend the river lashed together where cotton was damaged while being thus transported.

COMPETENCY AS WITNESSES OF PERSONS NOT PARTIES TO RECORD is presumed until the contrary appears, and the onus is upon the objector to

show the incompetency. It is not enough that a mere probability of incompetency should be raised; the facts upon which it depends must be fairly established.

PILOT IN CHARGE OF BOAT AT TIME OF ACCIDENT IS COMPETENT WITNESS FOR CARRIER in an action against him for damages to goods, unless it is affirmatively shown that the act of negligence that caused the injury to the goods rendered the pilot liable to the carrier.

ACTION by Lightsey against Johnson to recover the freight agreed to be paid for the transportation of the defendant's cotton on flat-boats from Selma to Mobile. The defendant pleaded that the cotton was damaged in the transportation, through the plaintiff's negligence, and that the defendant was entitled to recoup the damages. Upon its arrival at Mobile the cotton was found to have been damaged in its journey down the Alabama river to the extent of five or six dollars a bale. The bills of lading contained the customary clause, "excepting dangers of the river." The plaintiff introduced as a witness the pilot whom he employed to take the flat-boats down the river. The defendant objected to the competency of this witness, and after the evidence was closed, moved to exclude his testimony from the jury. The court overruled the objection and motion, and the defendant excepted. The pilot testified "that he had been a pilot on the Alabama river on steamboats for four years before 1855, but had never been a pilot on a flat-boat; that he was employed by the plaintiff to take said flat-boats to Mobile, and did take them to Mobile; that he started from Selma with two of the boats, and in passing a place called White's Shoal, with the two boats lashed together, one of them stranded and had to be left behind; that it remained there some five or six days, and was then taken off by a person employed for that purpose by the defendant; that the channel of the river at White's Shoal was narrow and dangerous, and the stream rapid; that one boat at a time could have entered or passed with safety, and both boats could have been taken through together if he had known the channel; and that he went on down the river to a place called Upper Peach Tree, and telegraphed back to Selma to know whether the river was rising." To the statement concerning his telegraphing to Selma, the defendant objected, as irrelevant, and the court having overruled the objection, the defendant excepted. The pilot also testified that when he left Selma it was the understanding that he was to take two of the boats and go to Upper Peach Tree, leave them there, and return to Selma for the other; and that this was the understanding between

the plaintiff and the defendant's agent at the instance of the latter. The defendant objected that this evidence was illegal and irrelevant, and, the court overruling the objection, the defendant excepted. The plaintiff asked the witness if it was usual on the Alabama river for flat-boats to go down two lashed together, and the witness replied that he had sometimes seen one boat, and sometimes two and three boats lashed together, going down the river. The defendant objected to this question and answer, because the evidence was illegal and irrelevant, and excepted to the overruling of his objections. Other evidence was introduced to show that it was customary for flat-boats laden with cotton to descend the Alabama river two lashed together. The defendant excepted to the overruling of his objections to this evidence. Upon these exceptions the defendant assigned error.

Alexander White, for the appellant.

J. R. John and John T. Morgan, contra.

By Court, A. J. WALKER, C. J. We cannot affirm that the court erred in the admission of evidence, unless the vice of its ruling is apparent from the bill of exceptions. The entire evidence in this case does not seem to be set forth in the bill of exceptions. It is conceivable that in a case where the negligence of a carrier by water is the point of controversy, the fact of his communicating with a point above on the river, as to the stage of the water, might be material and relevant. For example: if a boat were aground, it might be a matter of proper caution for the carrier to ascertain, by telegraphic communication, whether there was a prospect of an early rise in the river; the existence or want of such a prospect might materially influence the judgment of a prudent man in such a contingency; and it might be that the failure to resort to the telegraph for information as to the approach of a rise would justify an argument against the carrier as to the exercise of proper diligence. The bill of exceptions does not negative the existence of circumstances in which the testimony would have been relevant; and presuming in favor of the correctness of the ruling in the circuit court, we regard it as justified by the facts of the case as they were presented to that court.

The defendant could not complain that there was a delay at Upper Peach Tree while the pilot returned for other boats, if such delay was pursuant to his agreement, made through his

agent. He could recover no damages for injury resulting from a delay to which he assented: *Colbert v. Daniel*, 32 Ala. 814. It was therefore permissible for the plaintiff to prove that there was an "understanding" before the commencement of the voyage, with defendant's agent, that such delay should occur; because it afforded an excuse for that from which negligence might otherwise have been argued.

The fact that two boats, lashed together, had frequently been taken down the river, had a material and direct bearing upon the question whether there was negligence in the plaintiff's adopting the same plan. The tendency of the proof was to demonstrate that the plaintiff, in lashing two boats together, did not adopt a new and untried plan of navigation, but one which had been successfully practiced before. There was, therefore, no error committed in permitting the plaintiff to prove by his witness "that he had seen sometimes one boat, at other times two and three boats lashed together, going down the river;" and that it was customary, on the Alabama river, for flat-boats laden with cotton to descend two lashed together.

The remaining question to be considered in the case is, whether the pilot on the boats freighted with the defendant's cotton was competent to testify as a witness for the plaintiff. As the defendant prosecutes his claim against the plaintiff by plea of set-off, the question is to be considered as if the defendant were prosecuting a suit against the plaintiff, and the latter were offering the witness for his protection against a recovery. The argument for the appellant is, that the agent, for whose wrongful act, injuring the property of a third person, the principal is sued, must be an incompetent witness for the principal, where the same act which renders the principal liable also makes the agent liable to the principal. In such a case, the agent would certainly be incompetent to testify for his principal at the common law: *Bank of Oswego v. Babcock*, 5 Hill, 152; *Middlekauff v. Smith*, 1 Md. 329-341; *McClure v. Whitesides*, 2 Ind. 573; *Green v. New River Company*, 4 T. R. 589; *Gardner v. Smallwood*, 2 Hayw. 349; 4 Stark. Ev. 768.

If the question of the incompetency of the witness remains as it was at common law, we cannot affirm, upon the record before us, that the court erred in permitting the witness to testify. The incompetency of the witness, in such case, depends altogether upon the fact of the agent's liability to the principal. The conduct of the agent must therefore have been wrongful in reference to the principal as well as to the injured

person. It may have been such as to have rendered the principal liable, without involving any breach of duty on the part of the agent or pilot to the principal. An example would be presented if an agent should act wrongfully with the consent of his employer: *Barnes v. Cole & Fitzhugh*, 21 Wend. 188; *Noble v. Paddock*, 19 Id. 456; *Juniata Bank v. Beale*, 1 Watts & S. 227; *Stewart v. Kip*, 5 Johns. 256; *Smith v. Seward*, 3 Pa. St. 342; *Hawkins v. Finlayson*, 3 Car. & P. 305; *Whitmore v. Waterhouse*, 4 Id. 383.

The competency of persons, not parties to the record, is presumed until the contrary appears, and the onus is upon the objector to show the incompetency. It is not enough that a mere probability of incompetency should be raised; the facts upon which it depends must be fairly established, as must the affirmative of every issue of fact in judicial proceedings: *Rives v. Plank-road Company*, 30 Ala. 92. It devolved upon the defendant to establish that the very act or acts of negligence which constituted the *gravamen* of his action gave rise to a cause of action by the plaintiff against the pilot. This does not appear, from the bill of exceptions, to have been done. The causes of the plaintiff's damage are not traced to a misfeasance or malfeasance of the pilot in reference to the master. If there was improper delay, or if there was imprudence in lashing two boats together, it would be quite as reasonable to attribute those wrongs to the master (who may have been upon the boats, for aught that is disclosed by the record) as to the pilot. If it be said that the testimony shows that the stranding of the boat was attributable to the pilot, a satisfactory reply is, that it does not appear that the stranding was the cause of the injury complained of.

The judgment of the court below is affirmed.

THERE MUST BE LEGAL INTEREST IN EVENT OF SUIT TO DISQUALIFY WITNESS: *Sanford v. Howard*, 68 Am. Dec. 101, and cases cited in the note 108; *Hunter v. Blanchard*, Id. 547; *Nightingale v. Scannell*, 64 Id. 525; *Tenn v. McDonald*, Id. 65.

ERROR SHOULD BE MADE APPARENT BY RECORD: *Kirk v. Murphy*, 67 Am. Dec. 640, and cases cited in the note 642; *Sewell v. Eaton*, 70 Id. 471; *Rockmore v. Davenport*, 65 Id. 132.

USAGES AS AFFECTING CARRIER'S COMMON-LAW LIABILITY: See *Stark v. McTyer's Adm'r*, 70 Am. Dec. 516, note 523; *Cox v. Peterson*, 68 Id. 145, note 148; in construing bills of lading: *McClure v. Cox*, 70 Id. 552, and cases cited in the note 555; *Cox v. Peterson*, 68 Id. 145, note 148.

MOCK'S HEIRS v. STEELE.

[34 ALABAMA, 198.]

DISTRIBUTORS AND HEIRS AT LAW MAY OBTAIN RELIEF IN EQUITY AGAINST DECREE OF PROBATE COURT allowing the administrator on final settlement a credit to which he was not entitled, by showing that for the purpose of inducing the complainants not to object to the allowance of the credit he falsely represented the correctness of the credit, and falsely stated circumstances plainly demonstrating its correctness, and that they were ignorant upon the subject, and relying upon the representations, forbore to object.

BILL in equity, filed by the distributees and heirs at law of Mock, deceased, against Steele, who was formerly Mock's administrator, praying equitable relief against a decree of the probate court allowing to Steele, on the final settlement of his accounts as administrator, a credit to which he was not entitled. The credit in question allowed to the administrator was the amount paid by him to Mrs. Walker, wife of George Walker, as the owner of a judgment which had been obtained against Mock, George Walker, and one Lowe. The bill alleged that Steele, at the settlement, and in order to prevent the parties interested therein from making any objection to the claim in question, represented to them that Mrs. Walker became the owner of the judgment some time before as a part of her separate estate; that the judgment was unsatisfied, and Robert Lowe was insolvent; that in view of these facts, he had paid Mrs. Walker one half of the amount due on the judgment, and he offered her receipt as a voucher; that upon these representations, and with no other information concerning the claim, the complainants forbore to make any objection to its allowance, and it was accordingly allowed; that after the final settlement the complainants discovered from the sheriff's return, upon an execution issued on the judgment, that the judgment had been satisfied by a sale of property upon which the sheriff had levied; that the judgment was not a subsisting claim against Mock's estate when Steele made the payment, and Mrs. Walker was not entitled to anything from the estate on account thereof; and that Steele was aware of these facts at the time of the payment. The bill was dismissed for want of equity, and the complainants assigned error.

Watts, Judge, and Jackson, for the appellants.

Baine and NeSmith, contra.

By Court, A. J. WALKER, C. J. The bill shows that the defendant, Steele, upon his settlement as administrator, for the purpose of inducing the complainants not to object to the allowance of a particular credit, represented the correctness of the credit, and stated circumstances out of which it grew, plainly demonstrating its correctness; that the complainants, who were ignorant upon the subject, upon those representations, forbore to object; that the contrary of the representations was true, to such an extent as to destroy the right to the credit, and that the credit was allowed. These allegations make out a case for relief (the bill being filed within two years after the settlement in the probate court) under section 1915 of the code.

The error did not supervene in consequence of the fault or neglect of complainants. When a matter is equally open to the observation of both parties, or equally within the knowledge of both parties, it is a clear fault in one party to trust to the representations of the other, and he cannot be heard to complain if misled by representations: *Townsend & Milliken v. Cowles*, 31 Ala. 428. But in this case, the party making the representations had peculiar opportunities of information, beyond the parties on the other side, who were totally uninformed upon the subject, and he, in effect, solicited their confidence by making the representations with a view to obtain the forbearance of objections. They acted upon his representations, and reposed confidence in them. Can he now say that it was a fault on their part to confide in him and in his representations? If he can, it would establish a principle which would license the commission of fraud in every case where the deceived party could have ascertained the incorrectness of the representations upon which he acted. We hold that the defendant, Steele, cannot say that the complainants committed a fraud in trusting to his representations.

If the judgment, on account of the payment of which the credit was claimed, was paid by a sale of the property of George Walker, a co-maker with Steele's intestate, it would not give the wife of George Walker a claim to contribution. The right to contribution would belong to George Walker himself, and the claim could only be discharged by a payment to him.

The decree of the chancery court is reversed, and the cause remanded.

STONE, J., did not sit in this case.

WHERE FRAUD HAS BEEN PRACTICED BY ADMINISTRATOR IN SETTLEMENT OF HIS ACCOUNT, a court of equity will set aside the settlement, and direct a new one in the probate court: *Green v. Creighton*, 48 Am. Dec. 742, and note on conclusiveness of decrees of distribution, and power of chancery to correct or set aside settlement of accounts in probate court, 744-751. So equity will afford relief against a palpable mistake appearing upon the face of an executor's account after final settlement and allowance: *Black v. Whitall*, 59 Id. 423; see also *Salter v. Williamson*, 35 Id. 513, and cases cited in the note.

PARKMAN'S ADMINISTRATOR v. AICARDI.

[34 ALABAMA, 203.]

EQUITY WILL ENJOIN LESSEE FROM SUBLETTING, ON GROUND OF FRAUD, where the lessee, who had occupied the premises during a former term as a drug store, obtained a new lease at the instance of the sublessees for the purpose of subletting the premises to them to use in retailing spirituous liquors, without informing the lessor of the use to be made of the premises, and knowing that the lessor would not rent them for that purpose.

ADMINISTRATOR OF INSOLVENT ESTATE, PART OF WHICH IS UNDIVIDED HALF-INTEREST IN REALTY, may maintain a bill in equity to restrain an improper subletting, which would injure the value of the property or lessen the rents.

CO-TENANT OF LAND ABSENT FROM STATE MAY BE MADE PARTY DEFENDANT in suit by administrator of deceased co-tenant, even assuming that had he been within the state he must have been joined as complainant.

BILL in equity by Mrs. Parkman, as administratrix of Elias Parkman, deceased, against Aicardi & Tool, Bayol, and Goldsby, seeking to enjoin Bayol from subletting to Aicardi & Tool a store which he had leased from Goldsby, and which was owned jointly by Goldsby and the deceased. The store formed one of a block of stores, which were rented and used as storehouses. The rooms on the second floor were fitted up for lawyers' offices or sleeping apartments, and were rented and occupied for such purposes. The corner store of the block was fitted up as a drug store, and was rented to Bayne & Co., druggists, for one year, and was used by them as a drug store. Before the expiration of this term, as the bill alleged, Bayol, a member of the firm of druggists, applied to Goldsby for a renewal of their lease for another year, and Goldsby executed a new lease, supposing that the firm intended to use the premises as before. Bayol, it was alleged, made this application in his own name, at the instance of Aicardi & Tool, for the purpose of subletting the store to them to use as a retail grocery, for the sale of spirituous liquors, and because he knew that

neither Goldsby nor the complainant would consent that the premises should be used for that purpose. It was alleged that such a use of the premises would be a nuisance to the neighborhood, would cause irreparable injury to the premises, would impair the value of the adjoining stores and offices, and would diminish the rents. The estate of Parkman had been declared insolvent; Bayol was insolvent, and Goldsby was absent from the state. Bill dismissed for want of equity, and error assigned by the complainant.

Byrd and Morgan, for the appellant.

George W. Gayle, contra.

By Court, R. W. WALKER, J. In the case of *Nave v. Berry*, 22 Ala. 390, this court said in substance that when the contract of lease is silent, the law implies an obligation on the part of the lessee of a house not to put it to a use materially different from that for which it was constructed, and to which it is adapted and has been usually appropriated. It is an old principle of the common law that a tenant is guilty of waste if he materially changes the nature and character of the building leased. Thus it is held that he cannot convert a corn-mill into a fulling-mill, or a water-mill into a windmill, or a log-wood-mill into a cotton-mill, or a dwelling-house into a warehouse, or a brew-house into an office: *Bridges v. Kilburn*, 5 Ves. 689; *Kidd v. Dennison*, 6 Barb. 13; *Jackson v. Andrew*, 18 Johns. 433; 1 Eden on Injunctions, 186, and notes; Addison on Contracts, 380; *Shepard v. Briggs*, 26 Vt. 149. And many authorities, both English and American, declare that such changes will be deemed waste, even though the value of the property would be enhanced by the alteration: Authorities *supra*; also *Pyncheon v. Stearns*, 11 Met. 304.

A court of equity will restrain the lessee or his sublessee from making such material alterations as would change the nature of the building: *Douglass v. Wiggins*, 1 Johns. Ch. 435; *Bonnett v. Sadler*, 14 Ves. 526; 2 Story's Eq. Jur., sec. 913; *Maddox v. White*, 4 Md. 72.

In the view we take of this case, we need not inquire whether the use of the room in question as a place for retailing spirituous liquors, and the changes in its internal arrangements necessary to prepare it for such use, would constitute such a material alteration of the nature of the building, such a wide departure from the use for which it was erected, and to which it has been usually appropriated, as would, of itself, justify the

exercise of the preventive power of a court of chancery. We prefer to rest our decision upon other and much less doubtful grounds.

In the exercise of the inherent power which it possesses in cases of fraud, a court of chancery will interfere by injunction to prevent a party from availing himself in any manner of a right or title arising out of a breach of contract, trust, or confidence: *Prince Albert v. Strange*, 1 McN. & G. 25, cited in 3 Chitty's Eq. Dig. 2274, sec. 3; *Norway v. Rowe*, 19 Ves. 154.

It appears from the bill that at the time Bayol rented the house from Goldsby, the relation of landlord and tenant existed between them; a relation which, in the estimation of a court of equity so far partakes of a fiduciary character, that in all transactions between the parties in reference to the property the utmost good faith is required. "If there is any misrepresentation, or any concealment of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose and pronounce the transaction void, and as far as possible restore the parties to their original rights:" 1 Story's Eq. Jur., secs. 218, 323; Willard's Eq. 170, 189.

Bayol rented the house for the purpose of subletting it to Aicardi & Tool, to be used by them as an establishment for retailing spirituous liquors. He did not disclose to Goldsby the use to which he meant to appropriate the house, and must, under the circumstances, have known that Goldsby supposed it was to be occupied for the same purposes as under the former lease. It is further alleged that Bayol well knew at the time he obtained the lease that if the purpose for which the house was really rented should be disclosed to Goldsby, the contract would not be made; and it is shown that it was at the instance of Aicardi & Tool that Bayol rented the house in his own name and failed to make known to Goldsby the purpose for which it was wanted.

Assuming that the history of these transactions furnished by the bill is correct, whatever right Aicardi & Tool have acquired has been obtained by an abuse of confidence, and is the fruit of a fraudulent combination between themselves and Bayol formed for the purpose of entrapping Goldsby into a bargain which they knew he would not have made if advised of the secret intentions of the parties. If they are permitted to assert and enjoy the right thus acquired, the result will be that the value not only of this particular apartment, but of other rooms in the same tenement, for the special purposes for which they have been erected, prepared, and used, will be materially im-

paired. While it is undoubtedly true that a licensed retail grocery has the express sanction of law, and therefore cannot be pronounced *per se* a nuisance, yet we cannot so far ignore matters universally known as not to take notice of the fact (of which there is indeed an express allegation in the bill) that the occupation of a house for the purpose of retailing spirituous liquors has a tendency to render the adjoining rooms less desirable, and therefore less valuable as dry-goods and book stores, and lawyers' offices. It may be that the injury in the case would not be irreparable; nor, under the circumstances alleged, need it be. The equity of the bill rests, not upon the ground of nuisance or irreparable injury, but upon the inherent right of a court of chancery to prevent a party from asserting rights arising out of a violation of fiduciary duties, or procured by a fraudulent combination. Under the circumstances disclosed by this bill, we have no doubt of the right of Goldsby to an injunction restraining the parties from taking possession: *Bonnett v. Sadler*, 14 Ves. 526, 527; *Coffin v. Scott*, 7 Rob. (La.) 205; *Attorney-General v. Aspinall*, 2 Myl. & Cr. 613, 625; *Prince Albert v. Strange*, *supra*; *Norway v. Rowe*, *supra*; *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123.

It remains to be considered whether the complainant has such an interest in the subject-matter of this suit as gives her a title to relief. It was held before the code that the administrator of an insolvent estate cannot recover the possession of lands belonging to the estate by action at law: *Long v. McDougald*, 23 Ala. 419; *Patton v. Crow*, 26 Id. 426. This is now changed by statute: Acts 1857-8, p. 298. If the facts are as the complainant alleges, the estate represented by her had an undivided half-interest in this property, and a right to one half of the rents accruing before or after the death of the intestate. It is the duty of the administratrix to collect the share of the rents to which the estate is entitled, and to sell its undivided interest in the property. Whatever, therefore, would injure the value of the property, or lessen the rents, would diminish the assets of the estate. The bill shows, then, that the assets of the estate, which the complainant is to administer for the benefit of creditors, will be materially reduced if the defendants are allowed to enjoy the right which they assert. This is an interest which a court of equity will recognize and protect: 2 Story's Eq. Jur., sec. 914.

While at law all persons having a joint interest must join in the action as plaintiffs, in equity the general rule is that it is

sufficient if all the parties interested in the subject of the suit are before the court either as plaintiffs or defendants: 1 Dandell's Ch. Pr. 273. If it be assumed that the present case is an exception to this rule, and that Goldsby should have been joined as a complainant, unless a sufficient excuse is shown for not doing so, we think that his absence from the state constitutes such excuse: See *Morse v. Hovey*, 9 Paige, 197.

The questions arising upon the demurrer were the only questions considered by the chancellor, and we have confined ourselves within the same limits. We think that the chancellor erred in sustaining the demurrer and dismissing the bill.

The decree is reversed, and the cause remanded.

TENANT MAY SUBLET PREMISES WHEN LEASE CONTAINS NO STIPULATION AGAINST SUBLETTING, and the property may be used for any purpose not inconsistent with the terms of the lease: *Crommelin v. Thiess*, 70 Am. Dec. 499.

ANONYMOUS.

[24 ALABAMA, 430.]

DECLARATIONS OF HUSBAND AND WIFE, MADE AFTER EXECUTION OF SETTLEMENT made by the wife before the marriage upon her children born by a former marriage and to be born, are not admissible as evidence affecting the validity of the deed.

DURESS TO INVALIDATE DEED EXECUTED BY WIDOW SHORTLY BEFORE HER SECOND MARRIAGE, conveying her property to her children born and to be born, and reserving a life estate to herself, is not shown by proof of the distressed state of feelings exhibited by the grantor at the time of the execution of the deed, and of threats made by her son against her intended husband, but not communicated to her, when it appears that her distress and the threats were caused by her then pregnancy by her intended husband; especially where there appears to have been good reasons for the deed, and her second husband did not deny the validity of the deed for more than twenty years.

SECRET SETTLEMENT BY WIDOW TWO DAYS BEFORE SECOND MARRIAGE, conveying her property to her separate use for life, with remainder to her children born and to be born, is not a fraud upon the marital rights of her intended husband, when at the time of the execution of the settlement she was pregnant by him.

BILL in equity by the children and grandchildren of Mrs. Nancy E. C. by her first husband, against her surviving second husband, Samuel W., and the children of her second marriage, praying a partition of certain slaves. The complainants claimed the slaves under a deed executed by Mrs. C. two days

before her second marriage, and conveying the slaves and other property, in consideration of natural love and affection, to her children born and to be born, after reserving a life estate to herself. The answer claimed that the deed was void as being executed under duress, and because it was executed in anticipation of the second marriage without the knowledge or consent of the intended husband, and was therefore in fraud of his marital rights. Upon the hearing, the chancellor held that the deed was void, and dismissed the bill. The complainants assign error.

William P. Chilton and M. J. Turnley, for the appellants.

James B. Martin and G. C. Whatley, contra.

By Court, STONE, J. It is contended for appellees that the deed of Mrs. Nancy E. C., dated June 12, 1827, was obtained by threats and duress on the part of her children. The testimony relied on in support of this proposition is that of Mrs. D. and Mr. and Mrs. B. The testimony of Mr. D., who is a brother to Mrs. C., is by far the most important.

In pronouncing on this question, we feel it our duty to disregard, as illegal, evidence for appellees, all that either Mr. or Mrs. W. said after the deed was executed: See *Price v. Branch Bank at Decatur*, 17 Ala. 374; *Strong v. Brewer*, Id. 706; *Foots v. Cobb*, 18 Id. 585. This limits the testimony of Mr. D. on this point to what he says took place in the office of Mr. C. (an attorney) the day the deed was executed. On that day, Mr. C., Mr. W., and Mr. D. were present. Mr. F., the other subscribing witness was also present a part of the time. Mr. D. does not pretend that anything was communicated to him privately; but the language of his testimony tends strongly to the conclusion that what Mrs. C. stated was uttered aloud, in reply to what Mr. C. had said to her, and in the hearing of all present. If this be so, he stands contradicted positively by Mr. C. and Mr. W., and by strong implication in the testimony of Mr. F. In giving his testimony, Mr. D. betrays a want of accuracy as to the property conveyed, and the length of time which elapsed between the making of the deed and the solemnization of the marriage, which renders it extremely unsafe to trust his recollection. He is also contradicted by W. as to the object for which these two witnesses were procured to be present at the time.

It is not our purpose to reflect on the integrity of Mr. D. His testimony relates to a transaction which, when he deposed,

was thirty years old; and all men are liable to errors after so great a lapse of time. What we intend to affirm is, that the witnesses C. and W. betray a more intelligent appreciation and recollection of the transaction, and we accord to their testimony the greater weight.

The chancellor founds his decree on this point mainly on the distressed state of feelings exhibited by Mrs. C. while the deed was being prepared and executed. Her distress of mind is shown by the testimony of Mr. W. as well as that of Mr. D. We do not regard this circumstance as sufficient to establish the charge of coercion in procuring the deed. She was doubtless conscious that she was soon to be somewhat degraded from her former social position. It is probable that her family and friends, if not others, were already acquainted with her digression from the path of propriety. The testimony of many of the witnesses, including Mr. D., tends to show that the wrath of her son was caused by the disgrace which Mr. W. had brought upon their mother. We think her distress of mind may, with as much probability, be charged to a consciousness of impending disgrace as to any fears she may have entertained that her son would lay violent hands on Mr. W.

The testimony of the witnesses Mr. and Mrs. B., bearing in mind the great lapse of time between the occurrences about which they testify and the giving of their evidence, should, we think, weigh but little. They speak of threats made by the eldest son, and by a daughter of Mrs. C. The son was then probably under age, and the daughter much younger. There is no evidence that these threats were ever communicated to Mrs. C., and we do not think them sufficient to invalidate the deed on the ground of duress.

Two facts, in the absence of satisfactory evidence of threatened violence to the person of Mr. W., are decisive to turn the scale against this ground of relief: 1. The reasonableness of the presumption that Mrs. C., knowing the habits and poverty of Mr. W., would desire to secure her property beyond his power to charge it. This presumption is strengthened by the testimony of W.; 2. That Mr. W., after the marriage, and as long as he remained in South Carolina, some eight or nine years, did not claim the property as his own, but spoke of it as belonging to his wife. Nor do we hear of any effort on his part to undo the deed of June 12, 1827, until the year 1848—a period of more than twenty years. These circumstances, with the evidence stated above, are to our minds conclusive

against the charge of actual fraud, violence, and duress, relied on in the answer of Mr. W.

This case, then, is narrowed down to the following inquiry: Is the deed of June 12, 1827, constructively fraudulent as against the marital rights of Mr. W.? The facts are these: Mr. W. and Mrs. C. had an engagement to marry; they cohabited together, and Mrs. C. became pregnant. In this situation, two days before the marriage, Mrs. C., by deed, settled her property to her sole and separate use and enjoyment during her life, and at her death to her children by a former marriage, and such children as she might afterwards have. The testimony does not inform us that Mr. W. assented to the making of this deed, or had knowledge of it until after the marriage. It is contended for appellants that Mr. W., by force of the situation in which his conduct had placed Mrs. C., put it out of her power to retire from the marriage; that she was thus under moral duress, and could not, in the matter of requiring a settlement, deal with him on equal terms; and that this excuses her for resorting to the only expedient left her of making a secret settlement.

One argument urged by appellees against this view is as follows: Conceding that the chancellor, if Mr. W. were the actor in this suit—had himself invoked relief against this deed—would not, for the reason above stated, become active in his favor, still, a different rule applies when the powers of the chancery court are invoked in aid of a deed thus obtained; that while chancery will withhold all assistance from a husband thus in fault, it will nevertheless refuse all active sanction of a transaction which the law characterizes as a fraud upon the rights of the husband.

We concede that there are many transactions where chancery will not lend its aid to either party, but will leave them to such redress as the law can afford them: See 2 Story's Eq. Jur., secs. 736, 737, 742, 749, 750, 751, 767, 769, 771-779; *Blackwilder v. Loveless*, 21 Ala. 871; *James v. State Bank*, 17 Id. 69; *Pulliam v. Owen*, 25 Id. 492.

In the case of *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 589, 598, which presented the question of a usurious defense, we held that "the rule that a plaintiff who comes into a court of equity for relief against a judgment at law, or other legal security, on the ground of usury, cannot be relieved except upon the terms of paying to the defendant the principal and legal interest, applies to cases where the debtor has by his own voluntary act deprived himself of the opportunity to appear in

the character of the defendant and plead the usury." If we were to apply that rule to this case, it is manifest that the complainants, by no voluntary act of theirs, have made it necessary that they shall assert their claim as actors in a court of chancery. The accident which prevents them from joining as plaintiffs the other remaindermen, and thus asserting their claim at law, rendered a resort to chancery necessary. We do not, however, propose to base our opinion on this principle. If there be any merit in the excuse urged for making the *ex parte* settlement of her property by Mrs. C., it rests on the independent equity with which Mr. W. had, by his conduct, armed her; viz., that she was placed in moral duress by his act; that, in her then condition, she had no power to prescribe terms on which the marriage should take place; that to require his assent to the settlement would be simply an abandonment of her right to make it; that thus having an undue advantage of her, he will not be heard in equity to complain that the settlement of her property on herself during life, and afterwards for the equal benefit of all the children she might have, was a fraud upon his marital rights.

The precise question we are considering was before the English court of chancery in the case of *Taylor v. Pugh*, 1 Hare, 23 Eng. Ch. 608. The vice-chancellor refused to set aside the settlement, which was made by the intended wife on the eve of her marriage, and without the knowledge of her future husband; which settlement, like that made by Mrs. C., secured the property to herself during life, and afterwards to her children. The language of the court was: "By his [the husband's] conduct towards her, retirement from the marriage was on her part impossible. She must have submitted to a marriage with her seducer, even although he should have insisted on receiving and spending the whole of her fortune. The only way in which a woman can insist upon a settlement is by making it a part of the marriage treaty that her property shall be settled. The husband, by bringing the intended wife to his house and inducing her to cohabit with him before the marriage, deprived her of the power to protect herself, and thereby precluded himself from telling this court, with any effect, that his wife has committed a fraud upon him, because she has taken the precaution to have her property secured for herself and her children. I am very far within the limits of authority in saying that a woman, within the view of this court, commits no fraud on her husband, if, in circumstances like the present, she takes

the only means he has left her of protecting herself—that of making a settlement without his knowledge.

It will be observed that the vice-chancellor characterizes the husband as a seducer; speaks of his bringing his intended wife to his house and inducing her to cohabit with him. The report of the case contains no statement tending to show that the husband, by any act of his, induced the said Elizabeth to take up her abode at his house; nor does it show that he seduced her, or induced her to cohabit with him, further than those conclusions are inferable from her pregnancy at and before her marriage. No fact is shown which can in the least enable us to determine whether the husband or the wife was most in fault. Nor do we think this inquiry was deemed material by the vice-chancellor. He based his decree, not on the fact that the husband was most in fault, but on the fact that he had placed it out of the power of the wife to protect herself, by requiring a settlement. On this ground the court said, not only that the husband had precluded himself from telling the court, with any effect, that the wife had committed a fraud upon him, but added in another place that she had in fact committed no fraud upon him.

The language of the court copied above implies much more than that, owing to the conduct of the husband, the court would not interfere actively in his behalf. It in effect declares that the secret settlement made by the wife on the eve of her marriage was, under the circumstances, purged of all imputation of fraud upon the marital rights of her intended husband: See 1 Story's Eq. Jur., sec. 273, and note.

We fully approve the principles settled in *Taylor v. Pugh*, 1 Hare, 23 Eng. Ch. 608, and make them the basis of our decree.

From what we have said, it necessarily results that the chancellor erred in dismissing complainants' bill. He should have granted them relief.

Reversed and remanded.

A. J. WALKER, C. J., did not sit in this case.

VALIDITY OF MARRIAGE SETTLEMENT AS AGAINST HUSBAND AND HIS CREDITORS: *Spears v. Shropshire*, 66 Am. Dec. 206, and note 206.

SETTLEMENTS BEFORE MARRIAGE IN FRAUD OF HUSBAND MAY BE AVOIDED BY HIM: Note to *Merritt v. Scott*, 50 Am. Dec. 375: see *Charles v. Charles*, 56 Id. 155.

DECLARATIONS OF HUSBAND MADE DURING COVERTURE are not sufficient evidence of an antenuptial agreement: *Satterthwaite v. Emley*, 43 Am. Dec. 618.

WHAT CONSTITUTES DURESS: See *Alston v. Durant*, 49 Am. Dec. 596; *Moore v. Adams*, 32 Id. 723; *Eddy v. Herrin*, 35 Id. 261, and notes.

RELFE v. RELFE.

[24 ALABAMA, 508.]

VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY, UNDER PAROL EXECUTORY CONTRACT FOR SALE OF LAND, is not destroyed because the action at law to recover the purchase-money is barred by the statute of limitations. LIEN IS PRESERVED, NOTWITHSTANDING BAR OF DEBT, THOUGH DEBT IS BY PAROL.

PRINCIPLE THAT PRESERVES LIENS, NOTWITHSTANDING BAR OF DEBT, is that the statute of limitations does not extinguish the debt, but merely bars the remedy by action at law.

BILL TO ENFORCE VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY OF LAND is not a stale demand if filed within twenty years.

VENDOR UNDER EXECUTORY CONTRACT OF SALE DOES NOT HOLD ADVERSELY TO VENDOR, and he cannot invoke the analogy of the statute of limitations, in the absence of a holding positively hostile to the vendor, to defeat a bill to enforce the vendor's lien. The same rule applies between vendor and vendee as between mortgagor and mortgagee.

BILL filed March 6, 1858, by M. S. Relfe against his brother, B. J. Relfe, and the personal representatives and heirs at law of his deceased brother, D. J. Relfe, and alleging that in 1846 the complainant sold to his two brothers, by oral contract, his undivided one-third interest in a tract of land owned by the three jointly; that possession of the land was to be delivered January 1, 1846, and the purchase-money was to be paid in three equal annual installments on the first day of January, 1847, 1848, and 1849, the two vendees each to pay one half; that possession was delivered pursuant to the terms of the contract, and afterwards the two vendees agreed to divide the land, and each took exclusive possession of one half; that B. J. Relfe paid his one half of the purchase-money, but D. J. Relfe died in 1853 without having paid any part of the purchase-money due from him; that the complainant indulged the deceased vendee in the payment of the money because he was his brother. The bill prayed that the executor might be ordered to pay the amount due out of the personal assets of the estate, and if these should prove insufficient, that "the said real estate be then sold to pay the same, and the vendor's lien be enforced;" and for such other and further relief, etc. The defendants demurred: 1. Because the bill contained no equity; 2. Because the complainant's remedy was barred by lapse of time and the staleness of his demand; 3. Because his right to relief was barred by the statute of limitations of ten years; and 4. Because his right was barred by the statute of limitations of six years. The demurrer was sustained and the bill dismissed, and the complainant assigned error.

J. F. Clements, for the appellant.

Baine and NeSmith, contra.

By Court, A. J. WALKER, C. J. We approve and are content to abide by the decision in *Driver v. Hudspeth*, 16 Ala. 848, that the lien of a vendor, who has made an executory contract for the sale of land, is not destroyed, because an action to recover the purchase-money is barred by the statute of limitations. The principle which preserves liens, notwithstanding the bar of the debt, is neither confined to those secured by a conveyance, as, for example, a mortgage, nor to those secured by a sealed instrument, nor even to those provided by an express contract. Thus the lien of a pawnee, of an attorney, or of an acceptor having a collateral security, survives the bar of the debt by the statute of limitations: Angell on Limitations, sec. 73; *Morse v. Williams*, 3 Camp. 418. The principle is, that the statute of limitations does not extinguish the debt, but merely bars the remedy by action at law; and there is no inconsistency in the prosecution of another remedy after the action at law is barred: *Higgins v. Scott*, 2 Barn. & Adol. 413.

The decisions in New York and Mississippi, cited for the appellee, take a different view of the question; and one of them refers the preservation of a mortgagee's lien, after an action is barred, to the fact that the mortgage is under seal, and therefore its enforcement is governed by a different statute of limitations; and the other that the mortgage is separate and distinct from the debt, and a more solemn acknowledgment of and security for the debt, while the vendor's lien is a mere incident to the debt inferred by the law. These decisions are not, in our judgment, correct expositions of the law. The lien of a vendor and a mortgage are alike—in the same sense, and to the same extent—incidents of the debt. They are alike transferred by an assignment of the debt, and neither can survive the extinguishment of it; and the vendor and mortgagee alike have independent remedies, by taking possession, and by proceeding in chancery for a sale to pay the debt. The decision of this court is supported as well by authorities as by principle: *Hopkins v. Cockrell*, 2 Gratt. 88; *Reed v. Minell*, 30 Ala. 61; Cross on Law of Lien, 13; 34 Law Lib. 355; *Spears v. Hartly*, 3 Esp. 81; 2 Parsons on Cont. 379; *Bradford v. Spyker's Adm'r*, 32 Ala. 134; *Moreton v. Harrison*, 1 Bland, 491; 1 Hilliard on Mortgages, 656; also authorities upon brief of appellant's counsel.

So far as the question of staleness, as well as most other questions, is concerned, the vendor of land stands precisely as a mortgagee. We have decided, after careful consideration, that the possession of the mortgagor is not adverse to the mortgagee; and that the mortgagor cannot invoke the analogy of the statute of limitations, in the absence of a holding positively hostile to the mortgagee, to defeat a bill to foreclose: *Bird v. McDaniel*, 33 Ala. 18. We must adopt the same principle in reference to a vendor's bill to enforce his lien. If the vendee is regarded as holding under the vendor—if his possession is the possession of the vendor—it would be a violation of all precedent and principle to allow the acquisition of title by lapse of time. It would be like making lapse of time the origin of title in the tenant against his landlord. The law is well settled that the only doctrine available to the mortgagor, who holds in subordination of the mortgage, is the presumption of payment after the lapse of twenty years: Angell on Limitations, secs. 452, 453; 1 Hilliard on Mortgages, 473; 2 Id., p. 505, c. 26; *Christopher v. Sparks*, 2 Jac. & W. 233; 1 Powell on Mortgages, 396 a, 397, and note.

We conclude that none of the objections made in the argument of counsel to the equity of the bill are maintainable; and we direct that the chancellor's decree be reversed, and the cause remanded.

STONE J., did not sit in this case.

VENDOR ENTERING LAND UNDER CONTRACT OF SALE IS ESTOPPED FROM DENYING VENDOR'S TITLE: *Gossom v. Donaldson*, 68 Am. Dec. 723; *Hoen v. Simmons*, 52 Id. 291, and cases cited in the note 294; *Salmon v. Hoffman*, 56 Id. 322, note 326. A grantee of a vendee under an executory contract of sale may obtain title against the original vendor by adverse holding: *Robertson v. Wood*, 65 Id. 140.

VENDOR'S POSITION IS ANALOGOUS TO THAT OF MORTGAGEE when he has not conveyed the title to the land sold: *Salmon v. Hoffman*, 56 Am. Dec. 322, note 326.

MORTGAGE LIEN CONTINUES THOUGH DEBT SECURED BY IT IS BARRED: *Nevitt v. Bacon*, 66 Am. Dec. 609, note 615; *Bush v. Cooper*, 59 Id. 270.

STATUTE OF LIMITATIONS DOES NOT EXTINGUISH DEBT: *Wassell v. Reardon*, 54 Am. Dec. 245.

THE PRINCIPAL CASE IS CITED to the point that it is the settled doctrine in Alabama that the vendor's lien is not lost because an action at law for the recovery of the purchase-money is barred by the statute of limitations; nor is the demand for its enforcement stale unless its enforcement is delayed for twenty years after the purchase-money becomes due and payable: *Shorter v. Frazer*, 64 Ala. 80; *Chapman v. Lee*, Id. 485.

ROUNDTREE v. BRANTLEY.

[34 ALABAMA, 544.]

PLEA OF PRESCRIPTIVE RIGHT TO USE OF DITCH IN DRAINING DEFENDANT'S LAND presents no defense to an action for the overflowing of the plaintiff's land, caused by the formation of a dam in the stream from the washings of sand through the defendant's ditch; for the prescriptive right to the use of the ditch does not carry with it an easement of overflowing the plaintiff's land, since the sand bank causing the overflow may not have formed until some time within the period of prescription.

PRESCRIPTIVE RIGHT IS NEVER ALLOWED TO EXTEND BEYOND ADVERSE USER.

ACTION FOR DAMAGES FOR OVERFLOWING LANDS is barred in one year, under the Alabama statutes.

ACTION for the overflowing of the plaintiff's land, caused by the formation of a sand bank in a stream, from the washings of sand through the defendant's ditch. The defendant, in his second plea, set up an uninterrupted user of the ditch, which was constructed through his land, for twenty years, and the third plea was to the same effect, except that ten years was inserted instead of twenty years. The fifth plea was that the plaintiff's alleged cause of action did not accrue at any time within one year next before the commencement of this action. The plaintiff's demurrer to these pleas was overruled, and a nonsuit granted. The plaintiff assigned error. In other respects the opinion sufficiently states the case.

Alexander White, for the appellant.

Byrd and Morgan, contra.

By Court, A. J. WALKER, C. J. The *gravamen* of the complaint is, that the defendant caused a sand bank to be formed in a creek by digging a ditch in which the sand was washed down into the creek, and that the sand bank thus formed dammed up the water, and caused the inundation of contiguous lands of the plaintiff, a super-riparian proprietor. The subject of complaint is the formation of the sand bank and consequential overflow.

The second and third pleas interpose as a defense the length of time which had elapsed since the cutting of the ditch, and that if any dam was created it resulted from the accustomed flow of water and sand down the ditch into the creek during that time. The defense of these two pleas is the continued use of the ditch for the periods specified, and not the overflow of the plaintiff's lands during those periods. It is a prescriptive

right to the ditch, and not an easement to overflow the plaintiff's land by an obstruction of the natural and accustomed flow of the stream. It is altogether consistent with the averments of the pleas, that although the ditch had been cut and used from a time sufficiently remote to precede the commencement of the period of prescription, yet the formation of the sand bank had been gradually progressing, and did not attain such magnitude as to cause an overflow of the plaintiff's lands until within a very recent period. Thus the pleas place beyond the period of prescription the act of the defendant, putting in operation the agency, which, by a gradual accumulation of its effects, ultimately produced an interference with the plaintiff's rights; but do not show any disturbance of the plaintiff's right or detriment to him at a time beyond the period of prescription.

We entertain no doubt that, under the law as now recognized, a right to an easement upon another's land may be acquired by adverse enjoyment for a time corresponding with that which is prescribed in the statute of limitations in reference to the right of entry upon land: Angell on Watercourses, secs. 208, 209, 223, and note 2, containing extracts from Starkie on Evidence; *McArthur v. Carrie's Adm'r*, 32 Ala. 75 [70 Am. Dec. 529]; *Ricard v. Williams*, 7 Wheat. 59.

But the doctrine of prescription, which the defendant invokes, is founded upon the idea of long enjoyment and continued possession adverse to the plaintiff, which challenges the plaintiff's right, and in which the plaintiff acquiesces or is presumed to acquiesce; and the right presumed is never allowed an extent beyond the adverse user: Angell on Watercourses, secs. 200, 210, 215, 221, 224, 379; *Brown v. Cockerell*, 33 Ala. 38.

Until the obstruction had been formed in the creek, there was no interference with any right of the plaintiff; there was no enjoyment or possession of his land, and there could be no acquiescence by him in any hostile claim to anything which was of right his; and to allow the long user of a ditch, to drain the defendant's land, to create a presumption of a right to overflow the plaintiff's lands, would give to the prescription an effect far beyond the user.

The case of *Flight v. Thomas*, 11 Ad. & El. 688, is in principle analogous to this, and seems to decide the very point which the second and third pleas present. The plaintiff and defendant were occupants of adjoining premises; and the plaintiff alleged that the defendant, on his premises, caused noxious

smells, which rendered the plaintiff's "uncomfortable, unhealthy, unwholesome, and unfit for habitation."

The defendant pleaded the use of a mixen on his land for twenty years, which produced noxious smells, and that the smells complained of were necessarily produced by it. This plea being traversed, there was a verdict for the defendant. The plea was afterwards held bad, and the plaintiff was allowed to take judgment *non obstante veredicto*. The decision was placed upon the ground that the plea did not allege a right to make the smell on the plaintiff's premises; that there could be no claim of an easement, unless it was made to appear that the offensive smells had been used for twenty years to go over to the plaintiff's land; and that the plea might be proved without establishing the right to produce smells upon the plaintiff's land. Now, here is a case where the nuisance was alleged to have been a production of that which was possessed and used for more than twenty years; and yet the plea was held faulty, in not showing that the interference with the plaintiff's right had existed during the period of prescription. It seems to cover the precise question now in hand: Sedgwick on Measure of Damages, 107.

There is a class of cases in which parties are allowed to institute suit before any actual injury is done; but it is only when some right of the plaintiff has been infringed. For instance, suit may be brought for the obstruction or diversion of water-courses in infringement of the rights of the plaintiff, even before any actual damage is done; and two reasons are given for the doctrine: that wherever there is a wrong there must be a remedy, and the plaintiff must, at least, be entitled to nominal damages; and that otherwise the adverse enjoyment might ripen into a title by lapse of time before there was any actual damage: Angell on Limitations, sec. 300; *Whipple v. Cumberland Mfg. Co.*, 2 Story, 664; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. 241.

This case does not fall within the class above mentioned. The digging of the ditch did not, of itself, interfere with any right of the plaintiff, and gave rise to no cause of action in his favor. It did not at first obstruct the natural and accustomed flow of the stream. There was no infringement of any right of the plaintiff until the ditch had caused the formation of an obstruction; and consequently the computation of the period of prescription could not commence until that occurred.

Our investigations have not enabled us to find any ground

upon which the sufficiency of the second and third pleas can be sustained; and we must, therefore, decide that the court erred in overruling the demurrer to them.

The fifth plea simply relies upon the statute of limitations of one year: Code, sec. 2481. The plaintiff's cause of action is clearly in trespass on the case. It is a consequential injury done to the plaintiff's right to have a stream, of which he was a riparian proprietor, flow in its natural and accustomed manner, whereby damage was done to his land and crops. It falls within subdivision 6 of section 2481 of the code, which includes "civil action for any injury to the person or rights of another, not arising from contract, and not [therein] specifically enumerated." In the article of which that section is a part, there is no other provision which can include this cause of action. We have been referred to the first subdivision of section 2477, which makes six years the period of limitation to "actions for a trespass to real or personal property." It is argued that trespass is a comprehensive term, which includes trespass on the case, and that this cause of action is a trespass on the case to real and personal property, which is embraced in the section under the term "trespass." It is true that trespass, in one sense, means an injury or wrong; and in that sense it would include every cause of action, at least in tort. But trespass has, in the law, a well-ascertained and fixed meaning. It refers to injuries which are immediate, and not consequential. It is clear that the word is used in that sense in section 2477. It would be a perversion of language to denominate an act which produced a consequential injury to real or personal property a trespass. It would be a perversion alike of the legal and common acceptance of the words. Besides, we are not sure that the construction sought to be placed upon section 2477 would leave any field for the operation of the sixth subdivision of section 2481.

The judgment of the court below is reversed, the nonsuit set aside, and the cause remanded.

RIGHT TO MAINTAIN DAM CAUSING OVERFLOW OF ANOTHER'S LAND may be obtained by twenty years' user: *Cowell v. Thayer*, 38 Am. Dec. 400; *Williams v. Nelson*, 34 Id. 45, and note; see *Seidensparger v. Spear*, 35 Id. 234, and note 239.

RIGHTS AND LIABILITIES OF OWNERS OF DAMS: Note to *McCoy v. Danley*, 57 Am. Dec. 684-693.

BROUGHTON v. BRADLEY. BRADLEY v. BROUGHTON.

[34 ALABAMA, 694.]

WHETHER APPOINTMENT OF ADMINISTRATOR IS VOID OR VOIDABLE depends upon whether the court had or had not jurisdiction to make the appointment; if the court has such jurisdiction, any irregularity in the appointment can make it voidable and revocable only, and not void.

APPOINTMENT OF GENERAL ADMINISTRATOR OF ESTATE OF NON-RESIDENT TESTATOR instead of an administrator with the will annexed, where the court had jurisdiction to make the latter appointment, is an irregularity which renders the appointment voidable and revocable, but not void, and collaterally impeachable.

APPOINTMENT OF ADMINISTRATOR OF ESTATE OF NON-RESIDENT TESTATOR BY COURT HAVING JURISDICTION to appoint an administrator with the will annexed, cannot be impeached in an action by the foreign executor against the person who obtained such appointment after the commencement of the action, on the ground that the defendant did not disclose to the probate court the existence of a will, and misrepresented the amount of the assets within the county, since this does not constitute fraud sufficient to collaterally impeach the appointment.

ALABAMA STATUTE PERMITTING FOREIGN EXECUTORS AND ADMINISTRATORS TO MAINTAIN SUITS IN THAT STATE does not divest the state courts of jurisdiction to grant administration of the effects of a non-resident decedent within the state, and such letters of administration, granted to a defendant after commencement of suit against him by a foreign executor, will defeat the action when set up in a plea *puis darrein continuance*.

PLEA PUIS DARREIN CONTINUANCE IS NOT BAD UNDER ALABAMA CODE as professing to be in bar or of the entire action, when in fact it goes only to the further maintenance of the action, if the plea is "in short by consent," and does not in terms propose to bar the entire suit, but simply sets out the facts.

ACTION by Jackson J. Broughton, executor of the will of Edward Broughton, deceased, against Bradley, on certain promissory notes and bonds alleged to be due from the defendant to the plaintiff's testator. The action was commenced March 12, 1857, in the circuit court of Lowndes county. The defendant pleaded the general issue, payment, set-off, and that the plaintiff was not the real party in interest; and at a subsequent term pleaded *puis darrein continuance*, "in short by consent," that since the last term he had been duly appointed by the probate court of Lowndes county, and had qualified as administrator of the estate of Edward Broughton, deceased. The court overruled a demurrer to this plea, and sustained a demurrer to a special replication thereto; and issue was then joined upon this and the other pleas. The plaintiff proved the probate of the will of the deceased in the court of ordinary of Sumter district, South Carolina, and the issue of letters testamentary to himself. A

transcript of these proceedings was recorded in the office of the judge of probate of Lowndes county, Alabama, on July 2, 1858; and on November 3, 1858, the plaintiff executed a bond to faithfully administer whatever amount he might recover in the present action, pursuant to section 1934 of the Alabama code, *infra*. The defendant proved his letters of administration granted by the probate judge of Lowndes county, November 2, 1858. The petition for the letters alleged that Edward Broughton died in South Carolina in 1852, and owed some debts in Alabama; and that he had effects due him in Lowndes county, amounting to about five hundred dollars. The probate judge, introduced as a witness by the defendant, testified, on cross-examination by the plaintiff, that Edward Broughton never lived in Lowndes county, and had no property in that county to his knowledge, except the debt in suit, and no other assets of the estate in the county were mentioned to him or brought to his knowledge, and that the defendant, upon the application for the letters of administration, stated that he was a creditor of the estate. It was admitted that the decedent was a resident of Sumter district, South Carolina, and died there. The plaintiff asked the court to charge: 1. That if the defendant, after the commencement of this action, was appointed administrator of the decedent's estate by the probate court of Lowndes county, without any probate of the will therein, the appointment was void; 2. That if the jury believed from the evidence that the defendant, at the time he obtained the grant to himself of letters of administration on the estate of the decedent, was not a creditor of the estate, and that there were no creditors of the estate in the county of Lowndes, and no assets therein except the debt in suit, and that the defendant owed the debt to the estate, and pending suit thereon fraudulently procured the grant of administration to himself with the sole purpose to hinder, delay, and embarrass the executor in the collection of the debt, then the appointment was void. The court refused these instructions, and charged the jury, if they believed the evidence, to find for the plaintiff upon all the pleas, except the plea *puis darrein continuance*, and upon that plea to find for the defendant. The plaintiff excepted to the rulings of the court and the refusal of the instructions requested, and assigns error. The foregoing is the case of *Broughton v. Bradley*. The other case which the court considered at the same time, *Bradley v Broughton*, arose out of a petition filed by the executor Broughton in the probate court of Lowndes county, praying a revoca-

tion of the letters of administration granted to Bradley, on the ground that they were fraudulently procured by Bradley. The petition set out the facts given above concerning the residence and death of the testator, the appointment of the petitioner as executor, the institution of the suit against Bradley, and that Bradley, after the commencement of the suit and for the purpose of delaying the collection of the debt, obtained the letters of administration, and falsely and fraudulently represented to the court that the property of the estate within the limits of Alabama amounted to only five hundred dollars, when in fact it was worth two thousand dollars. Bradley demurred to the petition, but his demurrer was overruled. Upon the hearing the court revoked Bradley's letters of administration, and he now assigns error. Besides the sections of the Alabama code given in the opinion, two others are necessary to an adequate understanding of this case: section 1693: "Letters testamentary or of administration, and letters appointing a special administrator, or to any general administrator, sheriff, or coroner, granted by any probate court having jurisdiction, are conclusive evidence of the authority of the persons to whom the same are granted, from the date thereof until the same are revoked; and when granted, exclude the probate court of every other county from the jurisdiction thereof, and extend to all the property of the deceased in the state;" and section 1934: "Any executor or administrator who has obtained letters testamentary or of administration on the estate of a person who was not at the time of his death an inhabitant of this state, in any other of the United States (no letters testamentary or of administration having been granted in this state), may maintain suits and recover or receive property in this state: 1. By recording, at any time before judgment or the receipt of the property, a copy of his letters, duly authenticated according to the laws of the United States, in the office of the judge of probate of the county in which such suit is brought or property received; 2. Giving bond, with at least two good and sufficient securities, payable to and approved by the judge of probate of such county, in such amount as he may prescribe, to be determined with reference to the amount to be recovered or received, and conditioned to faithfully administer such recovery or property according to law."

Baine and NeSmith, and J. F. Clements, for Broughton.

Watts, Judge, and Jackson, and R. M. Williamson, contra.

By Court, STONE, J. These two cases are so intimately connected that we propose to consider them together.

The decision of these cases renders it necessary that we should determine whether the appointment by the probate court of Lowndes of Mr. Bradley as administrator of Edward Broughton, deceased, was regular or irregular; and if irregular, whether the appointment was absolutely void or only voidable. Mr. Bradley was appointed administrator generally, and not administrator with the will annexed.

Our constitutional and statutory provisions which confer on courts of probate power to take proof of wills, and to appoint administrators and executors, are the following:

"The general assembly shall have power to establish, in each county within this state, a court of probate, for the granting of letters testamentary and of administration, and for orphan's business:" Constitution of Alabama, art. 5, sec. 9.

"Courts of probate have, in the cases defined by law, original jurisdiction of: 1. The probate of wills; 2. The granting of letters testamentary and of administration, and the repeal or revocation of the same:" Code, sec. 670.

"Sec. 1621. Wills must be proven in the several probate courts as follows: 3. Where the testator, not being an inhabitant of the state, dies out of the county, leaving assets therein, in the probate court of the county in which such assets or any of them are; 4. Where the testator, not being an inhabitant of the state, dies, not leaving assets therein, and assets thereafter come into any county, in the probate court of any county into which such assets are brought."

"Sec. 1630. Where the testator was not, at the time of his death, an inhabitant of this state, and his will has been duly proved in any other state or country, it may be admitted to probate in the proper court of this state in the manner following."

Subdivision 1 provides for the probate of a will which has been admitted to probate in another state on the production of such will and the proceedings duly certified, etc.

"Sec. 1658. No person must be deemed a fit person to serve as executor: 2. Who is not an inhabitant of this state."

"Sec. 1664. If no person is named in the will as executor, or if they all renounce or fail to apply within the time specified in the preceding section, or are unfit persons to serve, the following persons are entitled to letters of administration with the will annexed, in the following order: 1. The residuary legatee; 2. The principal legatee."

"Sec. 1665. If such persons fail to apply within such time, refuse to accept or are unfit to serve, then such letters may be granted to the same persons, and in the same order, as letters of administration are granted in cases of intestacy."

"Sec. 1667. Courts of probate, within their respective counties, have authority to grant letters of administration on the estates of persons dying intestate, as follows: . . . 3. When the intestate, not being an inhabitant of the state, dies out of the county, leaving assets therein; 4. When the intestate, not being an inhabitant of the state, dies leaving no assets therein, and assets are afterwards brought into the county."

"Sec. 1676. The judge of probate may, in any contest respecting the validity of a will, or for the purpose of collecting the goods of the deceased, or in any other case in which it is necessary, appoint a special administrator, authorizing the collection and preservation of the goods of the deceased until letters testamentary or of administration have duly issued."

We have copied above the principal provisions of both the constitution and statute laws of this state which bear on the question of the regularity of Mr. Bradley's appointment.

The appointment of Mr. Bradley was not that of a special administrator under section 1676 of the code. His appointment was in terms general. Nor was the appointment made under section 1664 of the code, because the facts authorizing such appointment had not then transpired. Moreover, he was not appointed administrator with the will annexed. The appointment, then, must rest on section 1667, subdivisions 3 and 4 of the code, or it was improperly made. That section did not authorize the appointment, because Mr. Broughton did not die intestate. The appointment was, then, irregular: 1 Williams on Executors, 479-487.

Having attained the conclusion that the appointment of Mr. Bradley in this case was irregular, we approach the second question, viz., Was the appointment void or voidable?

In the case of *Sims v. Boynton*, 32 Ala. 353 [70 Am. Dec. 540], we held that the probate court, in the matter of the appointment of administrators, possessed the properties of a general jurisdiction; and that the fact of appointment carried with it presumptive evidence of authority to make it: See the authorities therein cited. We announced the same principle in *Ikelheimer v. Chapman's Adm'rs*, Id. 676. See also authorities cited in the dissenting opinion in that case, delivered by the writer of this opinion. The question above propounded, then, is solved by

answering another question, Had the probate court jurisdiction to make the appointment?

We hold that the jurisdiction of the court to make the appointment depends, not on the selection of the person to be clothed with the trust, but on the authority of the particular court to appoint a personal representative of the estate: 1 *Williams on Executors*, 491; *Miller v. Jones*, 26 Ala. 247; *Leonard v. Leonard*, 14 Pick. 280; *Emery v. Hildreth*, 2 Gray, 228; *Sharpe v. Hunter*, 16 Ala. 765.

Applying this rule to this case, testator, at the time of his death, was not an inhabitant of this state, nor did he die in any county in this state, leaving assets therein. No personal representative of his estate had been appointed within the state of Alabama; and he had assets in the county of Lowndes. These facts gave that court jurisdiction; and the fact that an administrator with general powers, instead of the executor, or an administrator with the will annexed, was appointed, was a question of regularity. It authorized a revocation of the appointment, but did not render it void.

We are aware that in some of the old decisions the appointment of an administrator, where there was a will, was said to be void: *Abraham v. Cunningham*, 3 Keb. 725; S. C., 2 Mod. 146; *Graysbrook v. Fox*, 1 Plowd. 275.

The tendency of modern decisions, however, upon this as upon many other questions, is not to pronounce judicial acts void unless forced thereto by some stern rule of law or of public policy. The consequences of pronouncing acts voidable rather than void commend themselves by such a healthy conservatism that courts should hesitate before declaring void what has passed judicial sanction.

In the case of *Ragland v. Green*, 14 Smed. & M. 194, a will had been probated. Subsequently the probate was set aside, and an administrator with general powers was appointed, who proceeded to administer the estate. One question made and considered was, whether, conceding the order revoking the will to have been without authority and void, the order appointing the administrator was without the jurisdiction of the court, and void. It was decided that "the [orphans'] court [of Mississippi] had jurisdiction of the subject-matter and of the persons. The fact of the existence of a will does not withdraw the estate from its cognizance. If the executor will not act, it becomes its duty to appoint an administrator with the will annexed. If a will be produced after the grant of letters of

administration, such letters may be revoked; but the acts of the administrator, consistent with law, are confirmed. We do not see, then, that this grant of administration can be regarded as void, though there is no doubt it was erroneous, and might have been revoked:" See also *Baldwin v. Buford*, 4 Yerg. 16; *Wilson v. Frazer*, 2 Humph. 30; *Price v. Nesbit*, 1 Hill Ch. 445, 461; *Saddler v. Saddler*, 16 Ark. 628; *Savage v. Benham*, 17 Ala. 119; *Burnley v. Duke*, 1 Rand. 108; S. C., 2 Rob. (Va.) 102; *Thompson v. Meek*, 7 Leigh, 419; *Hutcheson v. Priddy*, 12 Gratt. 85; *Kittridge v. Folsom*, 8 N. H. 98; *Parkman's Case*, 6 Co. 19; *Pettigru v. Ferguson*, 6 Rich. Eq. 378; *Shelden v. Wright*, 7 Barb. 39; *Emery v. Hildreth*, 2 Gray, 228; *Riley v. McCord*, 24 Mo. 265; *Tebbets v. Tilton*, 31 N. H. 273; *Peterman v. Watkins*, 19 Ga. 153.

Applying the principles asserted in *Ragland v. Green*, 14 Smed. & M. 194, to each of the cases under discussion, we think they settle the main questions presented by the assignments of error adversely to each appellant. These principles are also in strict conformity with the provisions of section 1693 of the code.

The section last mentioned, as the same appears in the printed code, is obscure. The word "conducive," in the fourth line, creates the difficulty. We have looked into the manuscript copy of the code, and find the same word there written "conducive." We have no doubt that the true word is and should be "conclusive;" and that the error originated in transcribing the manuscript. The context proves our inferences to be correct.

If the probate court of Lowndes had had no jurisdiction of the subject-matter—in other words, the testator being at the time of his death an inhabitant of the state of South Carolina, and dying there—if there had been at the time of the appointment no assets belonging to his estates in Lowndes county, then the appointment of Mr. Bradley would have been absolutely void, and would have been so declared when collaterally assailed. Section 1693 of the code would exert no influence on such a case: See *Treadwell v. Raney*, 9 Ala. 590; *Wilson v. Frazer*, 2 Humph. 30; 1 Williams on Executors, 488 et seq.; *Duncan v. Stewart*, 25 Ala. 408 [60 Am. Dec. 527]; *Matthews v. Douthitt*, 27 Id. 273 [62 Am. Dec. 765]; *Creath v. Brent*, 3 Dana, 127; *Sigourney v. Sibley*, 21 Pick. 101 [32 Am. Dec. 248]; see also *Woolley v. Woolley*, 5 Barn. & Ald. 744; *Dickenson v. Naul*, 4 Barn. & Adol. 638; *Allen v. Hopkins*, 13 Mee. & W. 93; *Hobart v. Frost*, 5 Duer, 672.

It is contended for appellant in the case of *Broughton v. Bradley*, that the circuit court should have submitted to the jury the question of fraud by Mr. Bradley in procuring the letter of administration to be issued to himself. The evidences of fraud relied on are, that Mr. Bradley did not communicate to the judge of probate the fact that decedent had left a will; and that he represented the assets within the county of Lowndes at about five hundred dollars, when he knew their value to be over two thousand dollars. There was also some testimony, the object of which must have been to disprove the statement in Mr. Bradley's petition, that decedent owed debts to persons resident in Lowndes county.

We do not think the tendency of the proof was to establish that description or species of fraud which strangers to a judgment may prove, and thus defeat and render void a judgment of a court having jurisdiction in the premises. The argument used above in favor of holding the appointment voidable rather than void applies to this feature of the case equally with that. Moreover, many of the authorities cited above show that the appointment of an administrator with general powers, made in disregard of a valid, subsisting will, is revocable, but not void: See Cowen & Hill's notes, p. 2, 78-80; *Hull v. Hamlin*, 2 Watts, 354; *Postens v. Postens*, 3 Watts & S. 127 [38 Am. Dec. 752]; *Baird v. Campbell*, 4 Id. 191; *Atkinson v. Allen*, 12 Vt. 619; *Hazelett v. Ford*, 10 Watts, 101; *Crawford v. Simonton*, 7 Port. 110.

It is also contended that plaintiff, having complied with section 1934 of the code, had a clear right to institute his suit; and having that right at that time, if another be permitted to take out letters of administration and defeat his suit, rightfully instituted, then section 1934 does not afford the remedy intended by it.

It is a clear and undisputed proposition that, independent of our statute, no executor or administrator, receiving his authority from the courts of any country or state other than our own, could maintain, as such, any suit in this state: Story's Conf. L., ed. 1857, sec. 513, and notes; *Vaughn v. Northrup*, 15 Pet. 1; *Harrison v. Mahorner*, 14 Ala. 829, 833, and authorities cited; *Carr v. Wyley*, 23 Id. 821.

His right to sue here is derived from our statute: Code, sec. 1934.

It is equally clear that, in the absence of such legislation as is prescribed by section 1934 of the code, when an inhab-

itant of another state dies, leaving effects in this state, the proper court of the county in which such effects are may grant administration on his estate: See authorities *supra*.

This being the case, is there anything in section 1934 which takes away the jurisdiction? There is certainly nothing in its letter, for it expressly recognizes the right in such cases to grant letters testamentary or of administration in this state. Neither do we think there is anything in its spirit which sanctions such construction. Our statute is one of comity. It was doubtless framed with a view to favor, without unnecessary expense, the early settlement of estates of non-residents who happened to own property or choses in action within this state. If we hold that an executor or administrator, receiving his authority under foreign appointment, can, by instituting suit in this state, oust our probate courts of all jurisdiction to appoint, is it not manifest that we put it in the power of a foreign representative, by hasty action, to close the doors of our tribunals, and thus deprive resident creditors of their rights to have their claims adjusted in our probate courts out of the assets found here? The third axiom of Huberus, which may be regarded as the general law of civilized nations, declares that "the rules of every empire from comity admit that the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the power or rights of other governments or of their citizens:" Story's Conf. L., ed. 1857, sec. 29, and notes to sec. 38. The principle contended for in this case would give to the foreign laws the same force which they have within the limits of the state or nation by which they were enacted, even to the prejudice of the rights of our citizens. Such generosity is neither required nor expected of any nation or state: See *Kennedy v. Kennedy*, 8 Ala. 391, 395; *Childress v. Childress*, 3 Id. 752.

Our statute, not creating an exclusive jurisdiction, must be held to confer only a cumulative remedy: *Anonymous*, 3 Dyer, 339 a; *Hunt v. Wilkinson*, 2 Call, 49 [1 Am. Dec. 534]; *Jewett v. Jewett*, 5 Mass. 275; *Bigelow v. Bigelow*, 4 Ohio, 138, 147 [19 Am. Dec. 591].

If, under this construction, it be thought that a foreign representative suing in our courts is always at the mercy of a litigious debtor, the answer is, that the legislature can correct the abuse. Perhaps, in such case, a statute prohibiting the appointment, after suit brought, of a resident administrator, except on satisfactory proof that the estate was liable for or owed

debts to residents of this state, would remedy the evil without impairing the right.

It is objected to the plea filed *puis darrein continuance* in this cause that it proposes to be in bar of the entire action, when the facts stated in it do not bar the entire action.

The previous decisions of this court hold that a plea which assumes to answer the entire action, and yet offers only a partial defense, is bad on demurrer. We have in this respect followed the English rule: *Stein v. Ashby*, 30 Ala. 863; *Bryan v. Wilson*, 27 Id. 208; *Deshler v. Hodges*, 3 Id. 509.

While it is not our purpose to shake the authority of the cases cited, so far as those cases go, we think extreme technicality in the matter of pleading should not be encouraged. Our code has done much to strike down the former sometimes shadowy structure, which, we think, did not well comport with the massive proportions of the common law.

In the case of *Deshler v. Hodges*, *supra*, the question did not arise, and the court simply stated the rule, holding that it did not apply in that case. In *Bryan v. Wilson*, *supra*, the action was against three, and two only of the defendants pleaded a defense personal to themselves. In the commencement of their plea, they employed the words "*actio non*" (the plaintiff ought not to have or maintain his action aforesaid). This was within the rule, for the plea offered no reason why the action should not be maintained against the third defendant.

In *Stein v. Ashby*, *supra*, the defendant pleaded, in bar of this action, a defense which barred only a portion of the damages. This also was within the rule.

The plea in the present case professes to be in short by consent. It contains no such words as "*actio non*," nor "in bar of this action." Neither does it in terms propose to bar the entire suit. True, it omits the word "further," which is usually employed in pleas *puis darrein continuance*; but we think it contains no averment which is inconsistent with such relief. It simply sets out the facts. This, we think, under the code, section 2237, and the case of *Deshler v. Hodges*, *supra*, amounts to a good partial defense to the action: See 1 Ch. Pl. 660; 3 Id. 1238; *McGowan v. Hoy*, 4 J. J. Marsh. 223.

We are aware that in the case of *McDougal v. Rutherford*, 80 Ala. 253, principle 3, a rule is asserted different from what we have stated above. That suit was brought before the code went into effect, and is consequently not governed by its provisions. We place our present opinion mainly on the provisions

of the code, which, in a great degree, dispense with the formal parts of pleading.

It results, from what we have said, that there is no error in either of the records under consideration.

Judgments affirmed.

REGULARITY OF APPOINTMENT OF ADMINISTRATOR CANNOT BE IMPRACHED COLLATERALLY: *Riser v. Snoddy*, 65 Am. Dec. 740; *Haynes v. Meeks*, 70 Id. 703, and note; cases cited in the note to *McFarland v. Stone*, 44 Id. 327. In Vermont, the jurisdiction of the probate court to make such appointment is held to be not collaterally attackable: *Abbott v. Coburn*, 67 Id. 735; *Driggs v. Abbott*, 65 Id. 214; *McFarland v. Stone*, 44 Id. 327. But ordinarily, the decision of the probate court upon jurisdictional fact is not conclusive upon any one not actually before the court: *Beckett v. Selover*, 68 Id. 237.

WHEN GRANT OF ADMINISTRATION OR PROBATE OF WILL is void for want of jurisdiction: *Fisher v. Bassett*, 33 Am. Dec. 227, and note 239-243, discussing this subject; see also the note to *Turk v. Turk*, 46 Id. 437. Two jurisdictional facts must exist to make a grant of administration valid: 1. The death of the party; 2. His residing within the county or leaving assets therein at the time of his death: *Beckett v. Selover*, 68 Am. Dec. 237, and cases cited in the note 257; note to *Fisher v. Bassett*, *supra*; *Haynes v. Meeks*, 70 Id. 703; *Fletcher v. Sanders*, 32 Id. 96; *Burnett v. Meadows*, 46 Id. 517. The validity of a grant of administration *de bonis non* depends upon the vacancy of the office of administrator at the time of the appointment, by the death, resignation, or removal of the preceding administrator: *Rambo v. Wyatt's Adm'r*, 70 Id. 544; *Matthews v. Douthitt*, 62 Id. 765. After a probate court has duly appointed a competent person administrator, it can make no further appointment to that office until the occurrence of one of those events or disabilities which either temporarily or permanently vacate the office, such as the death of the incumbent, the repeal of his authority, or his resignation. An appointment made before the happening of any of these contingencies is totally void: *Matthews v. Douthitt*, *supra*.

QUIS DARREIN CONTINUANCE, WHEN AND HOW PLEADABLE: *Adams v. Filer*, *ante*, p. 410; *Brown v. Brown*, 48 Am. Dec. 52; *Costar v. Davies*, 46 Id. 311; *May v. State Bank*, 40 Id. 726, and notes.

GUNN v. HOWELL.

[85 ALABAMA, 144.]

TWO CERTIFICATES, ATTESTING DIFFERENT RECORDS, WITH COMMON SIGNATURE AND SEAL, instead of one certificate for both cases, should not be considered fatally defective, where the two cases constitute an original suit and a collateral case of garnishment.

EXTRINSIC MATTER IN TRANSCRIPT IS NOT GOOD GROUND FOR EXCLUSION OF ENTIRE RECORD.

WHERE ALL PAPERS ARE NOT SET OUT IN TRANSCRIPT, the inference is, in the absence of all evidence to the contrary, that they have been lost or destroyed by accident rather than fraudulently suppressed.

IT IS PERMISSIBLE, AS PART OF DEFENSE, for defendant in garnishment to show that there was a valid judgment against his creditor which he paid under the compulsion of a garnishment.

GARNISHEE CANNOT AVAIL HIMSELF OF MERE IRREGULARITIES in a suit against his creditor.

GARNISHEE CANNOT ASSAIL COLLATERALLY JUDGMENT ENTERED AGAINST HIS CREDITOR upon the ground that it was voidable.

PARTY IS NOT DEPRIVED OF HIS PROTECTION AS GARNISHEE from a second payment on account of mere irregularities in the original suit.

OMISSION OF FOREIGN RECORD TO SHOW THAT JURY WAS IMPANELED AND SWORN, the service of the *scire facias* for the revivor of the suit on the defendants' attorney, and the failure of the record in the collateral garnishment suit to show that the original judgment was for an amount as great as that which was rendered against the garnishee, are mere irregularities which do not render the judgments void.

INDORSEMENT OF SHERIFF UPON EXECUTION RETURNED BY HIM IS MATTER OF RECORD.

WHERE FOREIGN COURT AMENDS JUDGMENT rendered in favor of a deceased defendant *nunc pro tunc*, on behalf of his representatives, it will be presumed that the amendment was within the jurisdiction of the court.

ABSTRACT CHARGES SHOULD BE REFUSED BY COURT.

CLIENT HAS NO RIGHT TO INTEREST IN FUNDS COLLECTED BY HIS ATTORNEY, who was subsequently garnished, unless a previous demand has been made upon him.

SHERIFF'S RETURN ON EXECUTION in the words, "I know of no property subject to the within *fiere facias*," is equivalent, in a collateral proceeding, to the return of *nulla bona*.

WHERE PARTY COLLECTS MONEY FROM GARNISHEE, he is not so interested as to incapacitate him from giving testimony, in a subsequent suit against the garnishee, as to the payment of the judgment.

ASSUMPSIT for money had and received. Plea of payment under foreign judgment and garnishment. Larkin R. Gunn sued Isaac Howell to recover the proceeds of two notes placed in his hands for collection. The declaration contained common money counts. Defendant pleaded, by consent, the general issue, payment, set-off, former adjudication, the statute of limitations, a special plea of a judgment rendered in Georgia against defendant as the debtor of plaintiff, and payment of that judgment. A transcript of the records of the Georgia original suit and the collateral garnishment suit was presented in connection with the last plea cited *supra*. The sufficiency of this plea was affirmed by the court on an appeal taken by the plaintiff. After remandment of the cause, plaintiff died, and the suit was revived in the name of his personal representatives. Plaintiff declared on the two notes, stating that defendant had been intrusted with their collection, and had obtained payment of two thousand dollars out of two thousand five hundred dollars, their face value. Defendant offered to

read in evidence the exemplification of the record of the court in Georgia, where he, as garnishee, had been compelled to deposit in court the money collected by him. The Georgia case was briefly as follows: James M. Calloway sued Archibald G. Jones and Larkin R. Gunn on three promissory notes. Before judgment, Calloway died, and this suit was revived in the name of Malcolm and Samuel Johnson, his administrators. Verdict was rendered in behalf of plaintiffs, execution issued, and the sheriff's return was in the words, "I know of no property subject to *fi. fa.*" Subsequently plaintiffs filed an affidavit and bond in order to obtain a garnishment against Isaac Howell. He appeared and pleaded that he was a non-resident of Georgia. His plea being overruled, he admitted having two thousand and eleven dollars and fifty-eight cents belonging to defendant Gunn, and was subsequently ordered to pay the money into court for the benefit of Malcolm and Samuel Johnson. This he did. The transcript exhibits an erroneous order made under a caption, with Calloway as plaintiff, when he was deceased, and a subsequent order, interpolating Malcolm and Samuel Johnson, his administrators, corrective of the former, and to act *nunc pro tunc*. This was excepted to, and exception was also taken to the exemplification generally together with eleven different charges asked for by plaintiff, and refused by the judge. Plaintiff assigned twenty-two errors, upon which he appealed.

G. W. Gunn, for the appellant.

William P. Chilton, contra.

By Court, A. J. WALKER, C. J. The objection to the entire record given in evidence, upon the ground that the certificate was defective, was not well taken. The certificate contains all that was necessary to legally attest both the record of the original suit against Jones and Gunn, and of the proceeding by garnishment against Howell as the debtor of the defendants in the former suit. There are, therefore, really two certificates, each attesting a different record, and a common signature and seal applicable alike to both. We know of no reason why such an attestation should be deemed fatally defective. It is clear that there is a certificate attesting each record, and each certificate is alike fortified by the signature and seal. This constitutes a substantial compliance with the act of congress.

It may be that the transcript does contain things which do not belong to the record. If it does, it was no ground for a motion to exclude the entire record.

The objection that a fraudulent exclusion of an execution, a part of the record, is apparent, is not well taken. There is nothing to indicate an exclusion of any execution or other paper from the record, which was attainable by the clerk. The inference is, in the absence of all evidence to the contrary, that the execution had been lost or destroyed by accident, rather than it was fraudulently suppressed. *Omnia presumuntur rite esse acta.*

The record offered in evidence did not correspond with that described in the sixth plea, as it is explained by the agreement of counsel. But there was a plea of *non assumpsit*, or the general issue; and under that a discharge of the defendant by a payment of the money due the plaintiff under a valid garnishment was an available defense: 1 Ch. Pl. 478; *Cook v. Field*, 8 Ala. 53 [36 Am. Dec. 436]. The court was therefore right in refusing to reject the record entirely because it did not correspond with the allegations of the sixth plea.

The record of the proceedings in the original suit of *Johnson & Johnson v. Jones & Gunn* was relevant in this case, and admissible in evidence. It was permissible for the defendant in garnishment to show that there was a valid judgment against his creditor, which he paid under the compulsion of a garnishment, for the existence of such a judgment was part of the defense; and there was no error in overruling the plaintiff's objections to the different parts of the record in that case.

The garnishee could not avail himself of any mere irregularities in the original suit against his creditor. He could not have assailed the judgment collaterally, upon the ground that it was voidable. He therefore is not deprived of his protection as a garnishee from a second payment, on account of mere irregularities in the original suit. The judgment in the original suit was not void. The court had jurisdiction of the defendants' persons. They pleaded and appeared by an attorney. The court properly refused to exclude any part of the record because it was irregular. If the service of notice to revive the suit in the name of the administrators of the deceased plaintiff was not consistent with the Georgia statute, it is a mere irregularity, not affecting the validity of the judgment. So also the omission of the record to show that the jury was impaneled and sworn, the service of the *scire facias* for the revivor of the suit on the defendants' attorney, and the failure of the record in the garnishment suit to show that the original judgment was for an amount as great as that which was rendered against

the garnishee, were, at most, mere irregularities, which do not render the judgments void.

The verdict to which objection was made was a matter of record. It seems to be a part of the judgment entry, and the predicate of the judgment.

One objection to the admissibility of the record specifies an extract from the execution docket, showing the issue and return of an execution. The exemplification does not show that the sheriff's indorsement upon the execution was copied from the execution docket. The indorsement of a sheriff upon an execution returned by him is a matter of record: *Creagh v. Savage*, 14 Ala. 454; *Hardy v. Gascoignes*, 6 Port. 447; *Barron v. Tart*, 18 Ala. 668. So much of the evidence covered by the objection as pertained to the sheriff's return was legal; and the objection, being a general one to evidence a part of which was legal, was properly overruled.

The two receipts—one by Bristow, the clerk, and the other by one of the plaintiffs in garnishment—were not parts of the record: *Carlisle v. Tuttle*, 30 Ala. 627; *Martin v. Martin*, 22 Id. 102; *Mitchell v. Mitchell*, 3 Stew. & P. 81; *White v. Strother*, 11 Ala. 723. The copies of them in the transcript were secondary evidence of private writings, and the court erred in overruling the plaintiff's objection to them. We cannot pronounce these receipts redundant evidence: *Doe v. Reynolds*, 27 Id. 364. They contributed to corroborate the witness Johnson. The credibility of Johnson's testimony was a question for the jury; and we cannot assert that the jury would have credited the evidence of Johnson in the absence of corroboration. This is not a case of merely redundant or superfluous testimony, introduced to support a right otherwise established by indisputable proof: *Kyle v. Mays*, 22 Id. 692; *Frierson v. Frierson*, 21 Id. 549; *Parsons v. Boyd*, 20 Id. 112.

The extracts "from the bench docket" did not belong to the record, and should have been excluded; but it is probable that the admission of that testimony would not work a reversal, as it seems incapable of affecting the issue in any way. The opinions delivered by the judge in Georgia, likewise, were not matters of record, and were inadmissible.

When this case was before in this court (27 Ala. 663), it was decided that the record of the proceeding against the garnishee in Georgia was defective, because it did not show the jurisdiction of the court. Since that time, an amendment *nunc pro tunc*, alike of the original judgment against the gar-

nishee's creditor and of the record of the proceeding against the garnishee, was made. These amendments show that the original judgment was in favor of the representatives of Calloway, there having been a revivor of the suit after the death of Calloway; that an execution issued, and was returned "no property found;" that the affidavit, preliminary to the issue of garnishment, required by the Georgia law, was made; that there was a valid judgment in favor of the plaintiffs in garnishment against the creditor of the garnishee, and that a regular summons of garnishment was served. These amendments *nunc pro tunc* supply every fact necessary to uphold the jurisdiction of the court to render the judgment against the garnishee, and the ground upon which there was a reversal when the case was before in this court no longer exists, if the court had authority to make the amendments *nunc pro tunc*.

There are many arguments adduced to show the want of authority to make those amendments; but none of them are, in our opinion, sound. It is said that the original judgment was in favor of a dead man, was therefore void, and could not be amended. The reply to this argument is, that the original judgment was really in favor of the representatives of the deceased, and was entered up by clerical error in favor of the deceased; and that the office of the amendment *nunc pro tunc* was to make the record declare the judgment as it was in fact—to make the record speak the truth, and show that the judgment was valid at the commencement. Our own decisions are conclusive against the objections that the amendments *nunc pro tunc* were made without notice: *Glass v. Glass*, 24 Ala. 468; *Allen v. Shotwell*, 8 Id. 281; *Brown v. Bartlett*, 2 Id. 29; *Fuqua v. Carrol*, Minor, 170 [12 Am. Dec. 46]. The same reason which dispenses with the necessity of notice would justify the making an amendment *nunc pro tunc* after the defendant's death. This court must presume, in the absence of opposing evidence, upon the authority of the certificates to the exemplification of the foreign record, showing the amendment *nunc pro tunc*, that the allowance of such an amendment appertained to the jurisdiction of the court: *Slaughter v. Cunningham*, 24 Ala. 269 [60 Am. Dec. 463]; *Gunn v. Howell*, 27 Id. 674 [62 Am. Dec. 785].

The first charge asked, objecting to the validity of the judgment against the garnishee, that he was a resident of the state of Alabama, cannot be sustained. The garnishee pleaded that very matter to the jurisdiction of the court, and his plea was overruled. The superior court of Georgia, having jurisdiction

over the subject of garnishment, had necessarily authority to determine whether a non-resident, under the laws of that state, could be subjected to the process of garnishment: *Wyatt's Adm'r v. Rambo*, 29 Ala. 510 [68 Am. Dec. 89]. Its decision upon that question must be deemed conclusive in favor of the garnishee.

If there is any proof in the record which justified the asking of the second charge, we have not found it. We therefore regard the refusal of the charge as correct, because it was abstract, if for no other reason.

There was no error in the refusal of the third charge asked, because the plaintiff could have no right to interest upon funds collected by the defendant as his agent for the period mentioned in the charge, unless a demand had previously been made: *Sally v. Capps*, 1 Ala. 121; *Barton v. Peck*, 1 Stew. & P. 486; *McBroom v. Governor*, 6 Port. 32; *Kimbrow v. Waller*, 21 Ala. 376.

The Georgia record showed a valid judgment against the garnishee; and if the defendant paid the money upon it, he is entitled to protection. The fourth, fifth, sixth, ninth, tenth, and eleventh charges were properly refused.

The seventh charge assumes, erroneously as we think, that the execution upon the original judgment was in the name of Calloway, then deceased, and that the execution which was returned with the indorsement, "I know of no property subject to the within *fi. fa.*," was the one upon the return of which the proceedings against the garnishee were predicated. The recitals of the judgment against the garnishee, as amended, show that there was a return of no property subject to the execution. Now, this recital, upon a question going to the jurisdiction of the court, must be deemed at least *prima facie* correct; and it is not overturned by the fact that one execution had been returned with a different indorsement. Both the recital and the fact that there was an execution with a different return may be true.

The eighth charge is also obnoxious to the objection that it erroneously assumes that the proceeding against the garnishee rests upon a different return from that stated in the record.

The refusal to give the eighth and ninth charges may also be sustained, upon the ground that the sheriff's return, "I know of no property subject to the within *fi. fa.*," is equivalent, in a collateral proceeding, to a return of *nulla bona*. It is his duty to find out any property within his bailiwick; and the presumption is that he has discharged his duty by making diligent search; and when he says he knows of no property

subject to the *fi. fa.*, it should be deemed, in a collateral proceeding, at least equivalent to a general return of *nulla bona*.

What we have already said leads to the conclusion that there was no error in the charge given by the court.

The witness Johnson was competent to testify for the defendant. The judgment upon which he collected the money from the garnishee being valid, he was rather testifying against his interest in deposing to the payment of the judgment.

The judgment of the court below is reversed, and the cause remanded.

PROPERLY AUTHENTICATED TRANSCRIPT OF RECORDS OF ONE STATE COURT IS ADMISSIBLE EVIDENCE in the courts of another state: *Slaughter v. Cunningham*, 60 Am. Dec. 463, and note 469, citing other cases.

GARNISHEE CANNOT REVERSE OR AVOID JUDGMENT ON ACCOUNT OF MERE ERRORS OR IRREGULARITIES in the proceedings in the principal action. They affect only the defendant, who alone can take advantage of them, and then only by appeal: *Earl v. Marthancy*, 60 Ind. 205, citing the principal case.

REFUSAL TO GIVE ABSTRACT CHARGE NOT ERROR: See *Cremella v. Thies*, 70 Am. Dec. 499, and cases in note 505.

BUFFINGTON v. COOK.

[35 ALABAMA, 312.]

IN ACTION FOR CONTRIBUTION BETWEEN TWO PARTIES, the record of the former trial, which showed that judgment had been rendered against the two jointly, and that one party had paid, will not be held sufficient to establish the relative liabilities of the defendants *inter se*.

WHERE EVIDENCE IS CONFLICTING IN LEAST DEGREE, the court should leave it entirely to the consideration of the jury.

ACTION for contribution. E. P. Chappell obtained judgment in a suit against Major Cook and Thomas M. Buffington. Cook paid the whole judgment, and now brings suit to compel Buffington to contribute. Buffington pleaded the general issue by consent, and entered a special plea that he had no interest in the contract upon which Chappell had based his successful suit, and that Cook alone was responsible under that contract. The parties went to trial on the issues made by these two pleas. On the trial, plaintiff read in evidence a certified transcript of the judgment in favor of Chappell, and the sheriff's receipt for the money paid by him. The action of Chappell against Buffington and Cook was based on a breach of contract. Chappell had paid them the sum of seven hundred dollars, for which he was to have a three-sixteenth inter-

est in the steamboat Clara, and the same share in the Champion when completed out of the materials of the old boat Clara. They refused to make title to him. He sued them and recovered judgment. Chappell testified that after he had purchased his interest in the boat Clara, and after she had been taken to Cincinnati in order to use a portion of her materials in the construction of the new boat Champion, he effected a sale of his interest to James M. Buffington for one thousand one hundred and twenty-five dollars. The Clara was destroyed by fire the next night after the sale. Cook effected a rescission of the contract, representing that "there was something wrong in Chappell's purchase." On the rescission of the contract Cook agreed to pay to Chappell the seven hundred dollars advanced under his purchase when the latter surrendered to him his interest in the boats. Cook subsequently refused to pay the seven hundred dollars, and the suit referred to was instituted. The judge charged the jury as follows: That this action being brought by plaintiff to recover from the defendant contribution to a judgment which had been rendered against them jointly, but which had been paid by the plaintiff alone, evidence of that fact would entitle the plaintiff to recover a moiety of the amount so paid by him, provided the jury should find that said judgment was recovered on a contract; that if the jury, however, should believe from the evidence that the defendant in this action was not bound by any such contract to pay the debt upon which said judgment was founded, then the defendant will not be liable to pay contribution; also, that the record produced in this action was *prima facie* evidence to support the action against the defendant, and the fact that the defendant suffered a recovery against him, and failed to defend the suit, is a circumstance from which the jury may infer a recognition on his part of his liability. The court also charged the jury (in order, as the judge stated, to avoid all misapprehension in regard to the law of the case), that if they believed the evidence, they must find for the plaintiff. Defendant excepted to these charges, and also on other grounds.

W. C. Easton, for the appellant.

S. F. Blount, contra.

By Court, STONE, J. In the suit between Chappell as plaintiff, and Buffington and Cook as defendants, the issue necessarily made by the pleadings was, whether the defendants, or either and which of them, had incurred a legal liability to the

plaintiff. As between the two defendants, there was, and probably could be, no issue formed on the relative liabilities of the defendants *inter sese*. Hence, in that trial, no evidence was or could be properly introduced or examined, having for its object the establishment of such relative liabilities. There is wanting, then, in this case, the necessary ingredients of an estoppel by record, as to the fact and measure of liability between Cook and Buffington: 1 Greenl. Ev., sec. 523.

The oral testimony did not authorize the charge which the court gave on the effect of the evidence. It certainly cannot be affirmed that it establishes, without conflict, the right of plaintiff to recover in this action: Shep. Dig. 459, secs. 13-15.

Reversed and remanded.

RIGHT TO CONTRIBUTION BETWEEN JOINT PRINCIPALS: See *Yates v. Donaldson*, 61 Am. Dec. 283, and note 294; *Taylor v. Morrison*, 62 Id. 747, 748.

WHERE EVIDENCE IS CONFLICTING IN QUESTION OF FACT material to the defense, the plaintiff is not entitled to a charge asserting his right to a recovery on the whole evidence: *Wolfork v. Sullivan*, 58 Am. Dec. 305. Instruction is erroneous when its effect is to take the case from the jury: *Tibbets v. Tibbets*, 59 Id. 329; *Tyner v. Stoops*, 71 Id. 341, and note 348.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

JACOWAY v. GAULT.

[20 ARKANSAS, 190.]

MORTGAGE NOT ACKNOWLEDGED, PROVED, AND RECORDED, as required by statute, though good between the parties, is not valid as against subsequent purchasers or incumbrancers with actual notice of the existence of the mortgage.

SUBSTANTIAL COMPLIANCE WITH WHAT STATUTE REQUIRES TO BE DONE ought affirmatively to appear from a certificate of acknowledgment of a mortgage. Although a literal compliance with the statute is not required, words of similar import must be employed.

COURTS CANNOT DISPENSE WITH SUBSTANTIAL COMPLIANCE WITH STATUTE, and by intendment supply important words omitted in the certificate of acknowledgment of a mortgage. Thus where the statute requires that the certificate contain the words "for the consideration and purposes therein set forth," their omission will render the certificate void.

THE opinion states the facts.

***Watkins and Gallagher*, for the appellant.**

***Jordan*, for the appellee.**

By Court, **ENGLISH, C. J.** This was a bill to foreclose a mortgage, determined in the Yell circuit court.

The bill was filed by Joseph Loupe, against Joseph Atchison, the mortgagor, and his wife, and Benjamin J. Jacoway, a subsequent purchaser. A decree of foreclosure and sale of the mortgaged premises was rendered against Atchison and Jacoway, and the latter appealed.

The contest here is between Loupe, the mortgagor, and Jacoway. The mortgage, upon a tract of land situated in Yell county, bears date the second of December, 1851, and is

signed by Atchison and wife, Molcy J. Attached to it is the following certificate:

"The state of Arkansas, county of Yell.

"This day personally appeared before me, N. S. Jennings, an acting justice of the peace in and for said county, Robert Atchison and Molcy J. Atchison, both personally known to me, and acknowledged that they signed, sealed, and delivered the same in my presents.

"Given under my hand this second December, 1851.

"N. S. JENNINGS, J. P."

There is also appended to the mortgage a certificate of the clerk and recorder of Yell county, that it was filed for record in his office on the fifteenth day of December, 1851, and duly recorded.

Jacoway purchased the land embraced in the mortgage of Atchison, for a valuable consideration, and obtained a deed of himself and wife therefor on the eighteenth day of December, 1851.

He states in his answer that he purchased in good faith without notice of the mortgage, and submits that the certificate of acknowledgment attached to the mortgage was informal and insufficient to authorize its registration, and that the filing of it in the recorder's office did not operate as a legal constructive notice to him of the existence of the mortgage when he purchased the land.

The case was heard upon the pleadings and exhibits, and an agreement of parties that the mortgagor remained in possession of the land until Jacoway purchased, when he took possession of it.

There is no question before us as to the validity of the execution and acknowledgment of the mortgage by Mrs. Atchison, and no decree appears to have been rendered against her, and there was no appeal by her or her husband.

Was the certificate of the justice of the peace, of the acknowledgment of the mortgage by the mortgagor, sufficient?

A mortgage not acknowledged, or proved, and recorded, as required by the statute, though good between the parties to it, is not valid as against subsequent purchasers or incumbrancers of the mortgaged premises, though they may have actual notice of the existence of the mortgage: Gould's Dig., c. 117, sec. 2; *Main v. Alexander*, 9 Ark. 112; *Hannah v. Carrington*, 18 Id. 105.

Mortgages must be acknowledged before some person au-

thorized by law to take the acknowledgment of deeds, etc.; Gould's Dig., c. 117, sec. 1. The acknowledgments of deeds and instruments of writing for the conveyance of real estate, or whereby such real estate is to be affected, in law or equity, shall be by the grantor appearing in person before the court or officer having the authority by law to take such acknowledgment, and stating that he had "executed the same for the consideration and purposes therein set forth:" Id., c. 37, sec. 18. Every court or officer that shall take the proof or acknowledgment of any deed of conveyance of real estate, etc., shall grant a certificate thereof, and cause such certificate to be indorsed on said deed, etc.: Id., sec. 16. All deeds and other instruments in writing, for the conveyance of any real estate, or by which any real estate may be affected, in law or equity, shall be proved or duly acknowledged in conformity with the provisions of this act, before they, or any of them, shall be admitted to record: Id. 22.

A substantial compliance with what the statute requires to be done ought affirmatively to appear from the certificate: *Trammell v. Thurmond*, 17 Ark. 217; *Blagg v. Hunter*, 15 Id. 246. A literal compliance with the statute is not required—the words of the statute need not be used—words of similar import may be employed, but the courts cannot dispense with a substantial compliance with the statute: *Brock v. Headen*, 13 Ala. 376; *Fipps v. McGehee*, 5 Port. 413; *Hinde v. Longworth*, 11 Wheat. 208; *Betts v. Merry*, 9 Mo. 510.

Courts cannot, by intendment, supply important words omitted in the certificate: *Hayden v. Westcott*, 11 Conn. 131; *Phill. Ev.*, Cowen & Hill's notes, pt. 2, 402.

In the certificate before us, the word "same" has no antecedent; but the certificate being attached to the deed, perhaps the word "deed," "mortgage," or "instrument" might be supplied by intendment, if this were the only defect in the certificate. So the words "signed, sealed, and delivered," employed in the certificate, are equivalent to the word "executed," used in the statute. But the words "for the consideration and purposes therein set forth," used in the statute, are wholly omitted in the certificate, and no words of similar import substituted therefor. We must suppose that these words were inserted in the statute for some useful purpose, and we have been able to find no authority to warrant their omission.

If they are to be disregarded, why not disregard any other provision of the statute? Where is the line to be drawn between what is essential and that which is not essential?

The certificate, taken altogether, is exceedingly informal and defective, and to sustain it would be to disregard the plain provisions of the statute.

The decree of the court below must be reversed, and the cause remanded, with instructions to dismiss the bill for want of equity as to appellant.

CERTIFICATES OF ACKNOWLEDGMENT.—Substantial compliance with statute requirements necessary. For an extended discussion of the questions arising in the principal case, see note to *Livingston v. Kettelle*, 41 Am. Dec. 168 et seq.; see also *Bryan v. Ramirez*, 68 Id. 340, and note 345.

UNDER ARKANSAS STATUTE providing for the registration of mortgages, actual notice of an unrecorded mortgage does not defeat the title of a subsequent purchaser: *Neal v. Speigle, Adm'r*, 33 Ark. 68; *Johnson v. Godden*, Id. 607; *Dodd v. Parker*, 40 Id. 540; *Carnall v. Dival*, 22 Id. 142; *Martin v. Ogden*, 41 Id. 192; *Ford v. Burks*, 37 Id. 94; the same rule applies where the mortgage is improperly admitted to registration: *Dodd v. Parker*, 40 Id. 540; but after the mortgage is properly acknowledged and recorded, it is a lien from the time it is filed in the recorder's office for record: *Jarratt v. McDaniel*, 32 Id. 602. A substantial compliance with what the statute requires to be done ought to appear affirmatively from the certificate of acknowledgment. A literal compliance with the statute is not required. The words of the statute need not be used, but words of similar import must be employed. Courts cannot dispense with a substantial compliance with the statute: *Little v. Dodge*, 32 Id. 458; *Tubbs v. Gatewood*, 26 Id. 131; and the courts cannot supply by intendment important words omitted in the certificate: *Little v. Dodge, supra*; so if the certificate omit to state the required words, "for the consideration and purposes therein set forth," such omission is fatal for the purpose of registration: Id.; *Johnson v. Godden*, 33 Id. 607; and the word "uses" is not of similar import or substantially the same as the word "consideration," required by the statute; the use of the former word renders the certificate invalid, and the mortgage not legally recorded: *Martin v. O'Bannon*, 35 Id. 67.

BRITTIN v. HANDY.

[20 ARKANSAS, 381.]

EQUITY PROHIBITS PURCHASE BY PARTIES PLACED IN SITUATION OF TRUST or confidence with respect to the subject of the purchase. This rule applies to purchases of outstanding titles and incumbrances by joint tenants, and in some instances by tenants in common.

WHERE JOINT TENANT OR TENANT IN COMMON purchases an outstanding title, which is adverse to the common title, his purchase is not void, but the co-tenant must elect within a reasonable time to avail himself of the adverse title so purchased, and offer to contribute his due proportion of money expended in such purchase.

PURCHASE OF CO-TENANT'S INTEREST IN LAND VALID.—Where vendor purchases the interest in land of one of the co-tenants, and there remains a balance of the purchase-money due him, secured by a note executed to
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him by both tenants in common, upon which they are jointly and severally liable, and there being no property out of which the vendor could secure his debt but the land, he brings suit upon the note, obtains judgment, and becomes the purchaser at execution sale, his purchase of his co-tenant's interest is valid.

INADEQUACY OF PRICE, HOWEVER GROSS, does not invalidate a judicial sale, made at the time and place prescribed by law, upon due notice, and without proof of any fraud, or unfairness, or means used to prevent competition.

THE opinion states the facts.

Watkins and Gallagher, for the appellants.

Garland, for the appellee.

By Court, **ENGLISH, C. J.** Bill for partition, etc., filed the ninth of October, 1852, in the Hempstead circuit court, by Levin J. Handy, against Benjamin L. Brittin and William W. Andrews.

The bill alleges that on the twenty-eighth of April, 1838, the complainant and William Conway B. purchased of Brittin that portion of the south-east quarter of the south-east quarter of section 21, township 11 south, of range 25 west, which lies on the south-east side of the public road leading from Washington to Fulton, in Hempstead county, containing from four and a half to five acres; for which they agreed to pay him five hundred dollars, and executed their joint note to him for that sum, payable in five years, with six per cent interest; and on the same day he made them a deed to the land. Immediately after their purchase, they took possession of the land, which was unimproved, and erected a dwelling and other improvements thereon, at an expense of some one thousand two hundred and fifty dollars, which improvements, with but few exceptions of little value, remain upon the land.

On the twenty-second of June, 1843, complainant paid on the note given for the purchase-money one hundred and twenty-five dollars; and shortly afterwards he made a further payment of one hundred dollars; the aggregate of the two sums being within twenty-five dollars of one half of the amount of the note; while Conway B. had never paid a cent upon the debt.

That in the summer of 1846 Brittin went to New York and was absent about twelve months. Previous to his departure he complained to complainant, as he had often done before, that Conway B. had paid nothing on said joint note, and observed that he would have to sue on the note in order to secure himself

against Conway B.; expressing regret that inasmuch as the note was a joint one, he could not sue Conway B. alone, but would have to join complainant with him; but assured complainant that inasmuch as he had paid almost the whole of his proportion of the note, his interest in the property should remain unimpaired by the suit, and should be retained and enjoyed by him as fully and to the same extent as if the suit had never been instituted; Brittin saying at the same time that his whole object in the suit was to drive Conway B. into a settlement, who was largely indebted to him independently of the joint note, and he wished to get the property into his own hands so as to control the interest of Conway B. therein. That after these assurances that complainant's interest in the premises—which he avers to be an undivided moiety—should remain unprejudiced by the suit, Brittin further agreed with him that if the suit was brought he would pay complainant's portion of the costs, and that he need be at no expense or trouble in the matter, declaring at the same time that he was very doubtful of Conway B., on account of his indebtedness to him in other matters besides the joint note, but that it was no part of his intention by the suit or any of its consequences to make complainant's interest in the premises liable for the payment of any part of the indebtedness of Conway B.—meaning thereby that he did not intend to hold complainant, or his interest in the land, liable for more than one half of the joint note.

That in consideration of these assurances, complainant agreed to take no dilatory steps to delay the progress of the suit, but to let judgment go by default, and allow the property to be sold as soon as the law would admit; and not to avail himself of the benefit of the appraisement act; and that Brittin should be allowed to bid in the property and hold it under the agreement aforesaid.

That Brittin shortly after went to New York, leaving Andrews, his ostensible clerk and agent, in charge of his business, who, pursuant to his directions, instituted suit on the note the twentieth of September, 1846, in the Hempstead circuit court. That Andrews requested complainant to let judgment go by default; and that if Conway B. did not settle before the property was exposed to sale, to allow him, Andrews, to bid it in for Brittin, assuring complainant that Brittin's only object was to secure himself against the indebtedness of Conway B. upon the note: and that complainant might feel entirely safe in intrusting the property to the control of Brittin, who would take

no undue advantage of him, but that his interest in the property should remain between Brittin and him as it had existed between him and Conway B.

That complainant, relying upon these additional assurances of Andrews, as the clerk, etc., of Brittin, interposed no defense to the suit; and that judgment by default was obtained therein the sixth of November, 1846, for five hundred dollars debt, and one hundred and forty dollars and forty-one cents damages, etc.; execution issued the seventh of January, 1847, was levied on the land in question, which was offered for sale the fifteenth of February following, and bid off by Andrews as the agent of Brittin, for five dollars, pursuant to the agreement between Andrews and complainant, and between complainant and Brittin. (The judgment and execution are exhibited.)

That Brittin, after the sale and purchase by Andrews, declared, proposed, and acknowledged to complainant, that after the payment of the joint debt due from complainant and Conway B. to Brittin the premises should belong to and become the property of complainant, and that all he, Brittin, wanted was to make the debt out of the property, and that complainant should have the residue; and complainant avers that he has always been, and still is, ready and willing to accept the property and pay to Brittin the balance due upon the debt, after deducting the payments made by complainant, and the amounts received by Brittin from sales and rent of the property,

That Brittin and Andrews, before and after the sale of the land under execution, were jointly interested in the profits of the mercantile business carried on in the name of Brittin, and in all purchases made with the capital stock, or by means of debts due the house in the name of either of them.

That in the course of a few months after the sale of the land, Brittin returned from New York, and in speaking of the property fully recognized complainant's interest therein according to the understanding and agreement above set forth, and requested him to take charge of the renting and selling of the property; that they agreed that they would not sell the land for less than one hundred and fifty dollars per acre, and that they would rent or sell the dwelling-house on the premises, as might seem to be most advantageous; that in pursuance of this agreement, Brittin sent divers persons to complainant, who had in view the renting or purchasing of some portion of the property; that Brittin and complainant did sell the dwelling-house, with a quarter of an acre of the land on which it is situated, for

four hundred and fifty dollars, and also other portions of the land, amounting to about an acre, for two hundred and twelve dollars and fifty cents; that these sales were made upon consultation and with the consent of complainant.

That previous to the sale of the dwelling-house, Brittin, in further pursuance and performance of the above agreement, paid to complainant one half the sums derived from the rent of the house from the time Andrews purchased it under execution to the time Brittin and complainant sold it as aforesaid. That complainant's portion of the rent was credited upon a store-account which he owed Brittin, etc.

That Brittin, in still further performance of said agreement, wishing to purchase complainant's interest in the premises, offered him fifty dollars in merchandise therefor at divers times, which complainant declined to accept, well knowing that his interest in the property was worth much more, etc. That at the time Andrews purchased the property for five dollars it was worth one thousand seven hundred or one thousand eight hundred dollars, and is still worth but little less; and that complainant's interest therein was one undivided half.

That when the joint note for five hundred dollars was executed, it was understood between the parties that complainant was to be responsible but for half of the amount; and having paid Brittin two hundred and twenty-five dollars, which was credited upon the note, he was indebted to Brittin but twenty-five dollars, balance of principal, when the judgment was obtained upon the note; which, with interest, was paid out of the proceeds of the sale of the house, etc. That after deducting the amount of such indebtedness, complainant was entitled to one half of the remainder of the proceeds of the two sales of portions of the property, made by Brittin and himself as above stated—the proceeds of the first sale being four hundred and fifty dollars, and of the second two hundred and twelve dollars and fifty cents.

That Andrews promised complainant to allow credits for the two hundred and twenty-five dollars paid by him upon the note before taking judgment, etc.; but, in violation of his promise, obtained judgment for the full amount of the note, etc.

That Andrews, after bidding off the property as the agent of and for Brittin, took the sheriff's deed therefor in his own name; and pretends to hold the property for his own use, though he professed to be acting for Brittin throughout the whole transaction, etc.

That there remain unsold of the original tract of land about three acres and a quarter, etc., worth from two hundred to two hundred and fifty dollars per acre. "That the land is capable of being divided without material injury to the rights of either Brittin or complainant, claiming as complainant does one undivided half of the tract, meaning the three acres and one quarter above mentioned, in accordance with the understanding and agreement, as set forth above, between Brittin and complainant previous to the institution of the suit upon the note, and carried out, acted upon, and confirmed by Brittin after the judgment was obtained and the property sold under the execution issued thereon."

Complainant further alleges "that he had frequently called upon Brittin to further comply with his said agreement with complainant, that his interest in said property should remain unimpaired and unprejudiced by said suit, and that complainant should have and retain, possess and enjoy, the same in as full and ample a manner as if the suit had never been brought, and to pay over to complainant his proportional share of the said four hundred and fifty dollars, for which the said house and said quarter of an acre of land was sold; also his proportional share of the said two hundred and twelve dollars and fifty cents for which the other portions of the land, amounting to about an acre, were sold; and also to make an equal division with complainant of the remaining three and one quarter acres of the tract," etc., which he has refused to do, etc.

The bill prays for an account of rents, proceeds, etc., and that one half of the amount thereof be decreed to complainant, after deducting therefrom the sum due to Brittin on that portion of the joint note for which complainant was liable; and that the remaining three and a quarter acres of land be equally divided between Brittin and complainant, etc.

That in case the relief above prayed be denied, that the court decree to complainant the whole of the land remaining unsold; and that Brittin account for and pay over to him all sums of money received by him of complainant, and from the sales and rent of the property over and above the amount of the debt due to Brittin from complainant, and Conway B., etc., and that Brittin and Andrews be compelled to convey the land to complainant, etc.

Brittin and Andrews answered severally. Brittin admits that he sold the land to complainant and Conway B., took their joint and several note for the purchase-money, gave them

a deed, and that they entered upon the land and made valuable improvements; but denies that the land was unimproved when he sold it to them, and avers that there was a house, etc., upon it, which they took down and removed, which rented for more than the one they erected, etc.

He admits that in the year 1853 complainant paid two hundred and twenty-five dollars upon the note, through John Field, to whom he sold his interest in the land, and afterwards took it back, etc., and that Conway B. had paid nothing upon the debt; admits that he left the state for the east in September, 1846, and was absent until June following, and thinks it probable, though his recollection is not distinct, that previous to his departure he complained to Handy that Conway B. had paid nothing upon the note. But he denies that he ever, at any time, said that he would have to commence such suit merely for the purpose of securing himself against Conway B., or that he ever expressed to complainant regret at having to join him in the suit, or that he assigned any such reasons for joining him in the suit as alleged in the bill; or that he in any manner assured complainant that his interest in the land should remain unimpaired or unprejudiced by the suit, or that he agreed or said anything to the effect that complainant should retain, enjoy, or possess his interest in the property to the same extent as if said suit had never been commenced; or that he ever said that his only object in bringing suit was to get control of Conway B.'s interest in the land, or anything to that effect; or that he ever agreed that he would pay complainant's part of the cost if suit was brought; or that he ever said anything to the effect that it was not his intention, by the suit or its consequences, to make complainant's interest in the land liable for the debt; or that he ever said that he did not intend to hold complainant or his interest liable for more than one half of the debt, or that he said or did anything calculated to induce such impression, etc.

He further positively denies that there was any such agreement or understanding between him and complainant in relation to said suit, proceedings therein, judgment, execution, or sale thereunder, as alleged in the bill.

Brittin further answers that two judgments were obtained against Conway B. in Pulaski circuit court, in November, 1842, executions were issued thereon to the sheriff of Hempstead county, levied on Conway B.'s interest in the land in question, and returned without sale. That afterwards *venditiones exponas* were issued, his interest in the land sold, and pur-

chased by John W. Cocke on the twenty-seventh of November, 1845, who obtained the sheriff's deed therefor. That on the second of January, 1846, respondent bought of Cocke the interest in the land so purchased by him, and received his deed therefor, whereby he became the absolute owner of Conway B.'s interest in the land; which was well known to the complainant before respondent left for the east in September, 1846; and which respondent avers to be sufficient to refute the charge in the bill that he assured complainant that his only object in instituting and prosecuting the said suit was to obtain the interest of Conway B. in the land.

He further answers that he was well aware that Conway B. and complainant were jointly and severally liable to him upon the note; but from the fact that, as between them, Conway B. should have paid half of it, respondent would have put himself to the trouble to collect it of him, as a favor to complainant, if it had been possible to do so; but he had become satisfied some time before the suit was brought that his only chance to collect the debt from either of them was by a sale of the land; and he positively denies that he only looked to or held complainant or his interest in the land liable for the payment of one half of the debt.

That when he departed for the east, he left his books, accounts, notes, etc., and among them the note of complainant and Conway B. in the hands of Andrews, his clerk and agent, empowering him to manage his business, collect the claims, etc., without any special instructions as to said note, leaving him to take such steps in relation to it, as well as other claims, as he thought proper.

He admits that Andrews caused suit to be brought on the note, that judgment was obtained, execution issued, the land levied upon and sold, purchased by Andrews, and conveyed to him by the sheriff; but he denies that these proceedings were had under or in pursuance of any such conversation, agreement, or understanding between complainant and Andrews in relation to the recovery of the judgment or the sale of the land as that alleged in the bill.

He admits that he returned from the east shortly after the sale of the land; but he denies that he did, at any time thereafter, in any manner, either as charged in the bill or otherwise, recognize or admit the right or title of complainant to any part of the land. But in answer to the charges in the bill in that behalf, respondent says that it has been almost an invariable

practice with him, when he bought property under execution in collecting a debt, to permit the debtor to redeem within a reasonable time by paying the debt. That as his only object in having the land in question sold was to secure or make the debt due from Conway B. and complainant, and not desiring to speculate upon the necessities of any one, after his return from the east, he told complainant if he and Conway B. would pay the amount due from them to him within any reasonable time, he was willing to let them have the property; or that if complainant could, within a reasonable time, make any sale or disposition of the land so as to pay the debt, he might do so, and could have the benefit of all he could realize above the amount due to respondent. And as complainant was always complaining and asserting that the property was worth much more than the amount due to respondent, for some time after his return, and after he had told complainant that he might redeem, when persons would call upon him to rent or purchase the land, he would refer them to complainant, being willing that he should have the benefit of any sale he could make—not that he had any right, but merely as a matter of grace and favor, etc.

Respondent denies that he ever requested complainant to take charge of the renting or selling of the land, or that they made any agreement in regard to the price at or manner in which they would sell or rent the property, or any part of it; or that he sent any person to complainant, having in view the renting or purchasing of any part of the land, to consult with him respecting the terms, in pursuance, or under or by virtue of any agreement to the effect that complainant's interest in the land was not to be impaired or affected by said sale thereof under execution, etc.

If complainant had made any arrangement by which the amount due to respondent would have been paid even within a year from the time Andrews purchased the land under execution, respondent would have let him have the property; but it could not have been asked or expected that he should have left his gratuitous proposal open for a longer period than he did.

Respondent admits that he has sold the dwelling-house, with a quarter of an acre of land upon which it stands, for four hundred and fifty dollars, and that he has also sold about an acre more for two hundred and twelve dollars and fifty cents; but he denies that complainant had any connection with any of said sales, or any interest therein; or that he was consulted in relation thereto, or that any of said sales were made with

or by his consent, as charged in the bill, or that he is entitled to any part of the money arising from such sales.

He denies that he ever accounted to complainant for any part of the rents of the property accruing after the sale of his interest under execution, or that he ever in any manner recognized or admitted his right to any such rents, or that he ever credited his account therewith.

He states that since complainant's interest in the land was sold under execution, and since it has greatly appreciated in value, respondent has been much annoyed by the importunity of complainant, who was in the habit of complaining of his misfortunes and the hardship of the case, and insisting that respondent should only hold him liable for one half of said note, and that upon his paying that, he should have one half of the land; and upon such occasions respondent has given him articles out of his store, such as clothing, etc., but he particularly denies that he has in any manner recognized or admitted complainant's right to any part of said land, or the rents accrued since said sale under execution, or in any manner accounted to or credited complainant with such rents.

He admits that a short time before the filing of the bill in this case, and after complainant had threatened to sue, respondent observed to him that though he had not a shadow of claim to any part of the property, yet if he brought suit it would cost respondent fifty dollars to employ a lawyer to defend it, and that he would rather give that sum to complainant than to a lawyer; and respondent did propose to give him fifty dollars in merchandise for his pretended interest in the property; but the offer was made merely by way of compromise, to avoid a law-suit, and was not intended as a recognition of any right in complainant, as was distinctly stated at the time, etc.

Denies that the land was worth anything near the sum stated in the bill at the time it was purchased by Andrews, and avers that until recently he would gladly have taken the amount due him, and relinquished the whole of the land; but in consequence of the improvement of the portions sold by respondent, and the general improvement in that part of the town of Washington in which the land is situated, its value has appreciated so that the part still owned by the respondent and Andrews is worth about three hundred dollars.

Admits that Andrews purchased the land in his own name, etc., but so far as any pretended right of complainant thereto

is concerned, it stands as though the sheriff's deed had been taken to respondent, etc.

States that the note of complainant and Conway B., with the payments made by the former indorsed thereon, was filed at the time judgment was taken, but the clerk of the court, in making a computation of the amount due, and in entering the judgment, omitted part of the credits by mistake, etc., but respondent claimed no advantage of such mistake, and is willing to allow credit for the full amount of the payments, etc.

Further answers that after he purchased the interest of Conway B., and before the sale to Andrews, the property was rented by complainant and respondent jointly; and that after the purchase by Andrews of one half the rents that accrued before said purchase, and whilst the land was held jointly by complainant and respondent, was credited and accounted for to complainant, etc.

Andrews states in his answer that when Brittin was about to start east, he placed in his hands his notes, accounts, etc., to be managed by him as his clerk and confidential agent, and that among said notes was the note of Conway B. and complainant; but he denies that, as regards said note, Brittin gave him any special instructions whatever, but, on the contrary, merely left the same, as all other papers, to be managed as to him should seem best. That the note being long due, and knowing that the only chance to make the money due thereon was by sale of said land, he caused said suit to be instituted, judgment to be obtained, execution to be issued, and the land to be sold; but he denies positively that he caused the suit to be instituted under any special instruction from Brittin; or that he did, as the clerk and agent of Brittin, or otherwise, request complainant to let judgment go by default, or request him not to retard the judgment, or delay the sale of the property, or that he made any agreement with the complainant of the purport or to the effect stated in the bill, or that he ever said or assured complainant that his interest in the land was not intended to be or would not be affected by said suit or sale, or that he said or did anything calculated to induce complainant to believe that the only object of the suit and sale was to reach Conway B., and avers every charge, averment, or insinuation in the bill, as to all such matters, to be untrue, etc.

He also avers that complainant long before knew that Brittin had purchased Conway B.'s interest in the land, etc. As to other matters, he answers in effect the same as Brittin.

The cause was heard upon the bill, answers, exhibits, repli-

cations, and the depositions of John Field, Henry J. Kimball, Charles B. Mitchell, and Eli V. Collins, and the court decreed:

That Brittin's account for all the rents of the land received by him, not before accounted for, together with the proceeds of the sale of any portion of the tract by him received, with interest from the receipt thereof; and that the same be applied in discharge of the residue of the purchase-money and interest unpaid and due to him from complainant and Conway B.; and that complainant pay to Brittin the residue of the purchase-money of the land, and interest yet unpaid; together with thirty dollars in the deed from Cocke to Brittin specified, with interest from the date of said deed; and that an account be taken of the matters herein, computing interest to the time of the statement thereof.

That Brittin and Andrews be enjoined from setting up any title to the land, etc.

That if complainant did not pay to Brittin any balance of purchase-money, etc., found to be due him, within thirty days from the confirmation of the master's report, the remainder of the land should be sold for the satisfaction thereof, etc.

Brittin and Andrews appealed from the decree, etc.

1. On the supposition that the appellee, Handy, was entitled to the whole of the land, as decreed by the court below, there was no necessity of referring the case to the master to ascertain what balance of purchase-money was due to Brittin; for, saying nothing of rents, it is manifest that the two hundred and twenty-five dollars paid by Handy about June, 1843, and the six hundred and sixty-two dollars and fifty cents received by Brittin from sales of portions of the land, overpaid the whole of the purchase-money and interest, it appearing from the depositions that none of the sales were made later than the close of the year 1848.

But the court manifestly erred in decreeing to Handy the whole of the land upon the pleadings and proof in the cause. By the conveyance from Brittin to Handy and Conway B., of September 28, 1838, they became joint and equal owners of the land. By the technical definitions of the common law, they were joint tenants.

It appears from the exhibits to the answer of Brittin, that Conway B.'s undivided half of the land was purchased by Cocke, under executions, the nineteenth of November, 1845, and that he and wife conveyed it to Brittin January 2, 1846.

The bill makes no allegations attacking the regularity or

validity of these sales and conveyances. Indeed, they are not mentioned in the bill at all.

The counsel for appellee submit that Brittin committed a fraud upon him in concealing from him his purchase of Conway B.'s interest in the land, etc.

But there is no allegation in the bill, or proof, of any such concealment. On the contrary, although it may be possible that appellee was ignorant of the fact that Brittin had purchased the interest of Conway B. in the land, even down to the time the bill was filed, yet the sources of information were ample and open to him; and the legal presumption would be that he was informed of the fact. The sale of Conway B.'s half of the land to Cocke, under executions, took place, it appears, at the court-house door, in the county in which Handy resided, and on the public day fixed by law for the sale of the land. The deed of the sheriff to Cocke was acknowledged in open court, and filed in the recorder's office for registration, and duly recorded. There is, therefore, no ground for the assertion that Brittin concealed from the appellee his purchase of the interest of Conway B. in the land; for if concealment was his purpose, the putting of his title upon the public records was not a sensible mode of accomplishing it.

The counsel for appellee further insist that Brittin and Handy being tenants in common, the former purchased the interest of Conway B. in the land for the benefit of the latter (Handy) as well as himself. In other words, that he purchased as a trustee for the benefit of his co-tenant and himself.

It need only be remarked, in response to this position, that until Brittin purchased the undivided half of Conway B., he had no interest in the land at all (except, perhaps, an equitable lien for the unpaid purchase-money); and that it was by virtue of that purchase that he became a tenant in common with Handy—then, and not before, the relation of tenant in common commenced between them.

There is no ground upon which the decree of the court below giving Handy the whole of the land can be maintained, upon the pleadings and proof in the cause, as above indicated.

2. It is next insisted by the counsel for appellee that Brittin, occupying to Handy the trust relation supposed to exist between tenants in common, could not purchase the interest of Handy in the land under execution; and that his purchase (through Andrews, his agent) was inequitable, fraudulent, and void. That Brittin, after obtaining judgment for the purchase-

money remaining unpaid, should have filed a bill for partition against Handy, and subjected his interest in the land to the satisfaction of the judgment, after adjustment of accounts, etc. In other words, the proposition is maintained that one tenant in common cannot purchase the interest of his co-tenant in the land under execution.

The authorities cited by counsel do not sustain this proposition.

The general principle is well established that equity prohibits a purchase by parties placed in a situation of trust or confidence with respect to the subject of the purchase—that no party can be permitted to purchase, for his own benefit, an interest, where he has a duty to perform which is inconsistent with the character of purchaser: *Dickinson v. Codwise*, 1 Sandf. Ch. 226.

And this rule has been applied to purchasers of outstanding titles and incumbrances by joint tenants; and in some instances, by tenants in common: 1 Lomax Dig. 262; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Flagg v. Mann*, 2 Sumn. 490; *Venable v. Beauchamp*, 3 Dana, 322 [28 Am. Dec. 74].

In *Van Horne v. Fonda*, *supra*, Chancellor Kent said: "I will not say, however, that one tenant in common may not, in any case, purchase an outstanding title for his own benefit exclusively. But when two devisees are in possession, under an imperfect title derived from their common ancestor, there would seem naturally and equitably to arise an obligation between them resulting from their joint claim and community of interest that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners, in which case all are entitled to the common benefit, on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties as claimants in common of the subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship between the parties as joint devisees created. Community of interest creates a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse

title, to disseise and expel his co-tenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest."

In *Flagg v. Mann*, 2 Sumn. 490, Judge Story, after quoting with approbation the above remarks of Chancellor Kent, says: "In the present case, the community of interest (if any) arose from direct contract between the parties; and from a direct agreement, not rescinded or abandoned, to purchase the original as well as the outstanding title upon joint account. In such a case, there would seem to be no room for doubt that, if the parties stood in the relation of co-tenants or joint owners, a court of equity ought to deem the purchase of an outstanding incumbrance or adverse title by one to be a trust for the benefit of both, if not *ex contractu*, at all events *in foro conscientiae*."

Mr. Lomax, after quoting also the above remarks of Chancellor Kent, says: "It is therefore considered that joint tenants and coparceners stand in such confidential relations in regard to one another's interest, that one of them is not permitted in equity to acquire an interest in the property hostile to that of the other. And therefore, a purchase by one joint tenant or coparcener of an incumbrance on the joint estate, or an outstanding title to it, is held at the election of his co-tenants, within a reasonable time, to inure to the equal benefit of all the tenants, upon condition that they will contribute their respective ratios of the consideration actually given.

"The same equity is considered as subsisting between tenants in common under the same instrument. But it is suggested that tenants in common probably are subject to this mutual obligation only where their interest occurs under the same instrument, or act of the parties, or of the law, or where they have entered into some engagement or understanding with one another for persons acquiring unconnected interests in the same subject by distinct purchases, though it may be under the same title, are probably not bound to any greater protection of one another's interests than would be required between strangers."

It may be remarked in the case now before us, Brittin did not purchase an outstanding title or incumbrance adverse to or affecting the common title of his co-tenant and himself, but he purchased the several estate of his co-tenant in the land under execution, etc.

It may be further remarked that Brittin and Handy were not

tenants in common under the same instrument, etc., but that they purchased at different times, and held by different titles, though both of their titles were derived from the same source.

It may be further observed that where a joint tenant or tenant in common purchases an outstanding title, which is adverse to the common title, his purchase is not void, but the co-tenant must elect, within a reasonable time, to avail himself of the benefit of the adverse title so purchased, and offer to contribute his due proportion of the money expended in purchasing the outstanding title.

In the case before us, the bill does not disclose the fact that the relation of tenants in common existed between Brittin and Handy. All that we know of the purchase of Conway B.'s undivided half of the land by Brittin, and of his thereby becoming a tenant in common with Handy, we learn from the answers and exhibits.

Considering the bill and answers, etc., together, and the case made is, that after Brittin had purchased Conway B.'s interest in the land, there remained a balance due to him upon the note executed to him by Conway B. and Handy, upon which they were severally as well as jointly liable, and for the payment of which Brittin had, perhaps, in equity, a vendor's lien upon the land. There being no property out of which he could secure his debt but the land, he brought suit upon the note, obtained judgment, caused the land to be sold under execution, and his agent purchased it.

Under these circumstances, in the absence of any positive rule of law forbidding it, we think his purchase of his co-tenant's title to the land was valid.

3. It remains to consider the only point really made by the *gravamen* of the bill.

It is alleged in the bill, in substance, that Brittin and Andrews induced Handy to interpose no defense to the suit upon the note, to take no steps to delay the sale of the land, and to permit it to be purchased under execution at a nominal price, upon a parol agreement that Handy's interest in the land should remain unimpaired by the sale, and that Brittin should hold it for the joint benefit of himself and Handy.

If these allegations had been proved substantially as alleged, the case would have been within the principle settled in *Trapnall v. Brown*, 19 Ark. 39, and Brittin would have been regarded in equity as purchasing in trust for the benefit of Handy, etc.

We have shown, in the statement of the pleadings above,

that Brittin and Andrews deny in the most direct and positive manner that any such assurances were given or agreement made as alleged in the bill.

If the allegations of the bill are true, and the denials of the answers false, it is the misfortune of Handy that he had no witness to swear to the truth of the one and the falsity of the other.

The substance of such portions of the depositions read upon the hearing, as are deemed material to the issue, is as follows:

John Field testified that in January, 1848, he purchased of Eli V. Collins a piece of ground which he (Collins) had previously purchased of Brittin—supposed to be half an acre—upon which Collins was erecting a house, etc. Witness moved into the house in the spring of 1848, and remained there until he sold it to Mrs. Johnson, etc. Some time after he moved into the house, he applied to Brittin to purchase a strip of ground adjoining that portion he had sold to Collins. The strip of ground witness wanted belonged to what was then called the Conway and Handy tract, and from which the piece purchased by Collins had been carved.

Witness had no conversation with Andrews or Handy on the subject. Brittin told witness he could have the piece of ground at one hundred and fifty dollars per acre. Witness had several conversations with Brittin in relation thereto. Witness insisted on getting the small strip of ground for less than one hundred and fifty dollars per acre. As well as witness can recollect, he understood from Brittin in some of their conversations that he had promised or agreed with Handy to sell the ground at one hundred and fifty dollars per acre. Such was witness's recollection; he might be mistaken, but did not think he was. He acted under that impression, at any rate, and accordingly went to Brittin again and closed the trade for the strip of ground, Dr. Mitchell being present. About thirty hundredths of an acre in the strip. Witness did not take a deed from Brittin at the time. Some time afterwards, he sold the pieces of ground purchased by him from Collins and Brittin to Mrs. Johnson, and as the title to both pieces was in Brittin, and perhaps in Andrews, witness got them to make the deed to her.

Henry J. Kimbell deposed that he had a conversation with Brittin in regard to the purchase of the land. Brittin said it was the Conway and Handy tract. A part of the same tract was sold to Collins and a part to Cimminati, situated in the town of Washington. Brittin stated to witness what he could

have it for by the acre, but he did not recollect the price. Brittin said it had been sold under his execution against Conway B., and Handy consented that it should all be sold together. This was about the time Cimminati bought of Brittin. He did not say whether Handy had or had not any interest in the land at that time.

Charles B. Mitchell deposed that he was present when John Field traded with Brittin for the strip of land on the east side of the tract purchased by Field of Collins, for which he agreed to give Brittin at the rate of one hundred and fifty dollars per acre, which was the price then fixed upon said land by Brittin. He said he would take no less for it. That was about the year 1848.

Eli V. Collins deposed that he once purchased of Brittin a tract of land situated in the town of Washington, which he afterwards sold to Field. At the time witness made the purchase, Brittin referred him to Handy as to the price of the land, and to ascertain whether Handy would agree to the price. Brittin stated the price to be at the rate of one hundred and fifty dollars an acre, and referred to Handy to know whether he would be willing to take the one hundred and fifty dollars per acre for the land. Brittin did not say at the time what interest Handy had in the land; but he said Handy had a say-so in the price of the land, but that the proceeds were to go to him, Brittin. Witness spoke to Handy and told him what Brittin had agreed to take for the land, and he consented to the sale, and agreed to the price, and witness made the purchase. Did not recollect how much land he purchased, but the deed made by Brittin would show.

It was his understanding that the land so purchased by him was a part of the Handy and Conway B. tract, so called. There was a house on the tract, erected by them, he supposed. Conway B. lived in the house at first. It could not have been built at that time for less than six hundred dollars, he judged. He rented the house of Brittin for a time, and paid the rent to him. In making the contract for the rent of the house, Brittin referred him to Handy for the price. Brittin told witness he could have it for four dollars and fifty cents per month, as he recollects, if Handy agreed to it, and he afterwards saw Handy, and Handy agreed to the price. Did not recollect that Brittin said Handy was to have the rent. Thinks Brittin said at the time that Handy was owing him, that he had paid money for him, and he was to have the proceeds of the land.

On cross-examination by the counsel for Brittin, etc., he stated that the purchase of the land by him from Brittin was in the year 1846, as near as he could recollect, but he was not sure about it. The year in which he rented the house, spoken of on his examination in chief, of Brittin was 1845. He thinks he rented it in the fall of 1846, and staid there until the spring of 1847, as near as he could recollect. The house, at the time he rented it, was not worth as much as at first. Brittin sold it to Cimminati for four hundred and fifty dollars, which was as much as it was worth.

The above depositions were taken in January and February, 1855.

The above declarations of Brittin to the witnesses, testified to after the lapse of six or seven years from the time they were made, together with the inadequacy of the price at which Andrews bid off the land at the execution sale, are the only facts adduced by Handy to overturn the solemn denials of the answers in relation to the agreement, etc., alleged in the bill as the grounds of relief. If such an agreement was in fact made, this case aptly illustrates the importance of reducing such agreements to writing, or of making them in the presence of witnesses. Collins's recollection seemed to be that it was in the year 1846 that Brittin referred him to Handy about the price of the land, etc.

Brittin purchased Conway B.'s interest in the land of Cocke the second of January, 1846, and Handy's half under execution the fifteenth of February, 1847. From the time of the first to the date of the second purchase, Brittin and Handy were joint owners of the land; it was proper that Handy should be consulted in relation to both the rent and sale of the land during that period, and it may have been during that time that Brittin referred the witness Collins to Handy in relation to the price, etc.

But if Brittin referred him to Handy in regard to the price of the land after the execution sale, this was not inconsistent with the statement in his answer, that after he became the owner of the whole of the land, he, as a matter of favor to Handy, told him that if he could redeem the land, or make sale of it, so as to pay his debt within a reasonable time, he could have the privilege of doing so.

The same may be said in relation to the statement of Brittin to Field, that he had promised Handy not to sell the land for less than one hundred and fifty dollars per acre.

It appears that under the execution in favor of Brittin, the sheriff levied on the land as the property of the defendants therein, and that Andrews bid off the interest of Conway B. for five dollars, and the interest of Handy for a like sum. The interest of Conway B. having been previously sold under executions and purchased by Cocke, and by him conveyed to Brittin, the sum bid by Andrews for it cannot be regarded as inadequate. But it is manifest that the amount for which Handy's interest in the land was struck off to Andrews was greatly below its value. The sale, however, was a judicial one, made at the time and place prescribed by law, upon due notice, and there is no proof that any means were used by any person to prevent competition.

We understand the rule to be, in reference to judicial sales, that in the absence of all fraud and unfairness, mere inadequacy of price, however gross, does not invalidate the sale.

If, however, the promises and agreements alleged in the bill had been proved by the oath of one witness, we should certainly regard the inadequacy of price, together with some of the declarations of Brittin subsequent to the sale, which are not satisfactorily accounted for, as such strong corroborating circumstances as would cause the oath of such witness to countervail the denials of the answers. But the witness is wanting.

The decree of the court below is reversed, and the cause remanded, with instructions to dismiss the bill, etc.

PARTY OCCUPYING POSITION OF TRUST cannot be both buyer and seller of the same property: *Remick v. Butterfield*, 64 Am. Dec. 316; *Tiedale v. Tiedale*, Id. 775; *Jewett v. Miller*, 61 Id. 751. This rule applies to tenants in common: *Tiedale v. Tiedale*, *supra*; *Sullivan v. McLennan*, 65 Id. 780, and notes to the above cases.

PURCHASE BY TENANT IN COMMON of an outstanding title inures to the benefit of all his co-tenants: *Lloyd v. Lynch*, 70 Am. Dec. 137, and note 141; but the purchaser is entitled to contribution from his co-tenant for the latter's proportion of the price paid for such title: *Venable v. Beauchamp*, 28 Id. 74; and the purchaser cannot assert such title against his co-tenants, so long as they are willing to contribute ratably to the cost of his purchase: *Sneed v. Atherton*, 32 Id. 70; but a purchase made by one not then a co-tenant does not inure to the benefit of those with whom he afterwards becomes such: Id.

PURCHASE AT EXECUTION SALE BY ONE CO-TENANT of the estate of the other is valid, and raises no resulting trust in the purchaser in behalf of the vendor: *Baird v. Baird's Heirs*, 31 Am. Dec. 399; *contra*, as to title acquired at tax sale: *Lloyd v. Lynch*, 70 Id. 137.

SHERIFF'S SALE WILL NOT BE SET ASIDE FOR INADEQUACY OF PRICE where there have been no unfair means employed to prevent competition: *Coleman v. Bank of Hamburg*, 49 Am. Dec. 671, and note 673; *Greamp v. Stehr*, 52

Id. 474; *Ingram v. Bell*, 47 Id. 591; *Allen v. Cole*, 59 Id. 549, and notes to these cases.

TENANTS IN COMMON ARE BOUND TO DEAL FAIRLY WITH EACH OTHER, and when placed in such confidential relations in regard to one another's interests that it would be inequitable to permit one to acquire a title for his own benefit, and expel his co-tenant, he will then be treated as a trustee as to the share of his co-tenant; but tenants in common are subject to this mutual obligation to preserve the estate for each other only when their interests accrue under the same instrument, act of the parties, or the law, or where they have entered into some agreement with one another; and parties acquiring unconnected interests in the same property by distinct purchases, though through the same title, are not bound to any greater protection of one another's interests than would be required of strangers: *Frents v. Klotzsch*, 28 Wis. 318; so where the co-tenant does not purchase an outstanding title or incumbrance adverse to or affecting the common title of his co-tenant and himself, but purchases the several estate of such tenant at trustee's sale, under a power and in the mode authorized by the co-tenant, in case he failed to pay certain notes given for the purchase-money, the purchase so made is not void, but simply raises an equity in favor of the co-tenant, who may elect, within a reasonable time, to avail himself of the benefit of the purchase, by offering to contribute his due proportion of the purchase-money. This is a personal option, and not a right attaching to the estate: *Burr v. Mueller*, 65 Ill. 282, both citing the principal case.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

BURNETT v. MAYOR ETC. OF SACRAMENTO.

[12 CALIFORNIA, 76.]

PROTEST AGAINST STREET IMPROVEMENT IS INEFFECTUAL, if it is not made within the statutory time, and if it does not appear that the required number of owners united in it, where the charter of a municipal corporation authorized the common council to levy special assessments for grading or improving the streets, and provided that when the council thought it expedient to open, alter, or improve any street, they should give notice by publication, and if one third of all the owners in value protested against the proposed improvement within ten days after the last publication, it should not be made.

PRIVATE PROPERTY IS NOT TAKEN FOR PUBLIC USE, within the meaning of the constitutional inhibition, by assessing the expenses of grading a street, already opened, upon the adjacent property.

CONSTITUTIONAL PROVISION THAT TAXATION SHALL BE EQUAL AND UNIFORM THROUGHOUT STATE has no reference to special assessments for local improvements, but applies only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the government of the state, or of some county or town.

LEGISLATURE MAY PROVIDE FOR EXPENSES OF LOCAL IMPROVEMENTS, either by general taxation upon the property of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto and specially benefited thereby.

ACTION to recover back two hundred and ten dollars, the amount levied upon the plaintiff's lots, as an assessment for grading and improving the streets adjacent thereto, and paid by him under protest. Acts amending the charter of Sacramento authorized the common council to levy, by ordinance, special assessments for grading or otherwise improving the streets or alleys of the city on the adjacent property situated

on the line of the improvement; and provided that whenever the council should think it expedient to open, alter, or improve any street or alley, they shall give notice thereof by publication, for ten days, in some daily newspaper published in the city, and should one third of all the owners in value, as shown by the last general assessment, of the adjacent property, protest against the proposed improvement within ten days after the last day of publication, then it shall not be made, but otherwise the council shall proceed with the improvement. Notice of improvement by grading of the street adjacent to the plaintiff's lots was published for the required period, the day of the last publication being August 15, 1855, and on August 20th the ordinance for the improvement was passed, and on the following day approved. A protest against the improvement was presented August 27th. The defendant had judgment, and the plaintiff appealed.

John Heard, for the appellant.

Winans and Moore, for the respondent.

By Court, FIELD, J. The protest presented on the twenty-seventh of August was ineffectual, for the reason that it was not made until after the expiration of the statutory time, and the further reason that it does not appear that one third of the owners in value of the adjacent property united in it. The passage of the ordinance on the twentieth and its approval on the twenty-first are of no consequence. Its validity is not affected, even if it were passed and approved before the expiration of the time limited for protest. The statute only inhibits the council from proceeding with the improvement in case of such protest, and it was competent for them to pass the ordinance in advance of the time, provided they did not attempt to enforce it until afterwards. The contract for the work was not made until September 7th, or approved until September 10th, and the work was not commenced until some time afterwards.

The case before the court is thus stripped of all objections to the regularity of the proceedings of the common council, and the appeal must be determined upon the constitutionality of the provisions of the law under which the defendants acted. The contemplated improvement was made, the street was graded, and the expenses were assessed upon the adjacent property. The amount levied upon the property of the plaintiff was two hundred and ten dollars. This he paid under

protest to prevent a sale, and now brings his action to recover back the money.

The appellant contends that the law in authorizing special assessments for the expenses of improvement upon the adjacent property conflicts with section 8, article 1, of the constitution, which provides that private property shall not be taken for public use without just compensation, and section 13, article 11, which provides that taxation shall be equal and uniform throughout the state.

Whether the taking of private property in the opening of a street, and the apportioning of the expenses among the owners of adjacent property, would be within the prohibition of the eighth section of the first article of the constitution, it is unnecessary to determine. Our impressions are that it would not be, if such expenses were assessed upon the property in proportion to the amount of benefit produced; but this question does not properly arise in the case at bar. Here there has been no exercise of the right of eminent domain. No private property of the plaintiff has been taken for public use. His land remains untouched. The street was previously opened, and it is that which has been improved by grading. The assessment is the tax levied to meet the expenses of the improvement. Money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself, and the general doctrine of the authorities of the present day is, that the compensation must be either made or a fund provided for it in advance.

The assessment, therefore, must rest for its validity upon its being a legitimate exercise of the taxing power. The thirteenth section of article 11 of the constitution does not cover the case. That section provides for equality and uniformity of taxation upon property, but applies, in our judgment, only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the government of the state, or of some county or town. We do not think it has any reference to special assessments for local improvements, by which individual parties are chiefly benefited in the increased value of their property, and in which the public is only to a limited extent interested. For the expenses of such improvements, it is competent for the legislature to provide, either by general taxation upon the property

of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto and specially benefited thereby. The law in question places the burden upon the adjacent property, which is a far more equitable apportionment than if imposed upon the entire property of the city. There would, indeed, be manifest injustice in levying a general tax for a local improvement which produces a great benefit to the owners of property in its vicinity, but lessens, perhaps, at the same time the value of property at a distant part of the city. In such taxation, there would be no equality. "It is wrong," says Ruggles, J., in delivering the opinion of the court of appeals of New York, in *People v. Mayor etc. of Brooklyn*, 4 N. Y. 419 [55 Am. Dec. 266], "that a few should be taxed for the benefit of the whole; and it is equally wrong that the whole should be taxed for the benefit of a few. No one town ought to be taxed exclusively for the payment of county expenses; and no county should be taxed for the expenses incurred for the benefit of a single town. The same principle of justice requires that where taxation for any local object benefits only a portion of a city or town, that portion only should bear the burden. There being no constitutional prohibition, the legislature may create a district for that special purpose, or they may tax a class of lands or persons benefited, to be designated by the public agents appointed for that purpose, without reference to town, county, or district lines.

"General taxation for such local objects is manifestly unjust. It burdens those who are not benefited, and benefits those who are not burdened. This injustice has led to the substitution of street assessments in place of general taxation; and it seems impossible to deny that in the theory of their apportionment they are far more equitable than general taxation for the purpose they are designed for."

The law in question avoids the injustice of general taxation for local purposes, and lays the burden upon the recipients of the benefit. It apportions the tax according to the assessed cash value of the adjacent property, which is as near an approximation to an equitable rule as can well be established. No rule could be adopted which would work absolute equality. An approximation to it is all that can be attained. The power of apportionment, with the power of taxation, is exclusively in the legislature. The constitution contains no inhibition to the tax, and prescribes no rule of apportionment. Security against the abuse of the power rests in the wisdom and justice of the members of the legislature, and their responsibility to

their constituents. See *People v. Mayor etc. of Brooklyn*, 4 N. Y. 419 [55 Am. Dec. 266], and the cases cited in the opinion of the court and the briefs of counsel, which latter are in the appendix to the volume, p. 607.

Judgment affirmed.

TERRY, C. J., and BALDWIN, J., concurred.

PRIVATE PROPERTY IS NOT TAKEN FOR PUBLIC USE, within the meaning of the constitutional inhibition, by assessing the expenses of a local improvement upon property benefited, or by exercising the taxation power generally: *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 266, and note; *Nichols v. City of Bridgeport*, 60 Id. 636; *Williams v. Cammack*, 61 Id. 508; *Louisville etc. R. R. v. County Court*, 62 Id. 424; *Hill v. Higdon*, 67 Id. 289. The enforcement of a valid tax is not a taking of private property for public use: *Hagar v. Supervisors of Yolo Co.*, 47 Cal. 234, citing the principal case.

CONSTITUTIONAL PROVISION THAT TAXATION SHALL BE EQUAL AND UNIFORM has no reference to special assessments for local improvements: *Hill v. Higdon*, 67 Am. Dec. 289. The principal case is approved on this point in *Emery v. San Francisco Gas Co.*, 28 Cal. 361; *Chambers v. Satterlee*, 40 Id. 514; *Hagar v. Supervisors of Yolo Co.*, 47 Id. 234; *Pulmer v. Stumph*, 29 Ind. 336; *King v. City of Portland*, 2 Or. 158; but criticised in *City of Chicago v. Larned*, 34 Ill. 280.

ASSESSMENTS FOR LOCAL IMPROVEMENTS MAY BE MADE ACCORDING TO BENEFITS: *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 266, and note; *Nichols v. City of Bridgeport*, 60 Id. 636; *Moale v. Mayor etc. of Baltimore*, 61 Id. 276; *Williams v. Cammack*, Id. 508; *Louisville etc. R. R. v. County Court*, 62 Id. 424; *Taylor v. Commissioners of Newberne*, 64 Id. 566; *Hill v. Higdon*, 67 Id. 289; *Garrett v. City of St. Louis*, 69 Id. 475. The principal case is cited to this effect in *Chambers v. Satterlee*, 40 Cal. 514; *Whiting v. Townsend*, 57 Id. 519; *County Judge of Shelby Co. v. Shelby R. R.*, 5 Bush, 229; but criticised in *City of Chicago v. Larned*, 34 Ill. 280.

ASSESSMENT FOR LOCAL IMPROVEMENT IS IN EXERCISE OF TAXING POWER: *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 266, and note; *Nichols v. City of Bridgeport*, 60 Id. 636; *Williams v. Cammack*, 61 Id. 508; *Hill v. Higdon*, 67 Id. 289. The principal case is cited to this point in *Harvard College v. Aldermen of Boston*, 104 Mass. 482; *Emery v. San Francisco Gas Co.*, 28 Cal. 352.

WHEATLEY v. STROBE.

[12 CALIFORNIA, 92.]

ORDER POSSESSES ALL REQUISITES OF INLAND BILL OF EXCHANGE when it directs a certain person to "please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account."

USE OF WORD "PLEASE" WILL NOT ALTER CHARACTER OF INSTRUMENT otherwise a bill of exchange.

VERBAL ACCEPTANCE OF BILL OF EXCHANGE IS INSUFFICIENT to charge the person to whom it is addressed as an acceptor, under the California statute concerning bills of exchange.

ORDER OPERATES AS EQUITABLE ASSIGNMENT of the debt or fund against which it is drawn, where it is of the full amount of the demand, and is given for a valuable consideration, although it is not available as a bill of exchange for want of a written acceptance.

WANT OF WRITTEN ACCEPTANCE DOES NOT AFFECT PAYEE'S RIGHT TO MONEY DUE under an order on a third person, but only the mode of enforcing it. With the acceptance, he can sustain an action upon the order; but without it, he must recover upon the original demand by force of the assignment.

DEBT DUE BY DRAWER OF ORDER CANNOT BE REACHED BY ATTACHMENT issued by the creditors of the drawer after delivery and presentation of the order.

ACTION to recover a sum of money. Strobe was indebted to Wheatley, Wheatley to Howel, and Howel to Wilcoxson & Co. To pay his debt, Wheatley gave Howel the following order on Strobe: "Sac. City, July 18, 1857. Mr. Strobe—Please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account. E. D. Wheatley." On July 25th the order was presented to Strobe, who verbally accepted it. Shortly afterwards Wilcoxson & Co. garnished the debt due by Strobe to Howel by virtue of the order. Subsequently Wheatley commenced the present suit against Strobe to recover the original debt. Strobe's answer admitted the original indebtedness, but set up the order, his verbal acceptance, and the garnishment by Wilcoxson & Co., and prayed that Howel and Wilcoxson & Co. might be made parties, and he be allowed to pay the amount into court. Wilcoxson thereupon filed a petition of intervention, setting up substantially the same facts, and prayed judgment in their favor. The demurrer of the plaintiff to the answer of Strobe was sustained, and with the judgment entered thereon, the petition of intervention was denied. The defendants appealed.

P. L. Edwards, for the appellants.

H. H. Hartley, for the respondent.

By Court, **FIELD, J.** Upon the facts in this case the appellants make two points: 1. That the verbal acceptance of Strobe was sufficient to render him liable to Howel upon the order of Wheatley; and 2. If this be untenable, that the order operated as an equitable assignment of the demand against Strobe, which thus became subject to attachment as the property of Howel.

The first of these points cannot be sustained. The order possesses all the requisites of an inland bill of exchange. It

contains a direction for the payment of money by one person to another, absolutely and at all events. As no time is specified, it is to be taken as payable at sight. No further particulars than these are essential to constitute a bill of exchange. The insertion of the word "please" does not alter the character of the instrument. This is the usual term of civility, and does not necessarily imply that a favor is asked: Story on Bills, sec. 33, and notes; 3 Kent's Com. 74.

The order being a bill of exchange, the written acceptance of Strobe was necessary to charge him as acceptor under the statute. His verbal acceptance was insufficient: Act concerning Bills of Exchange, sec. 6. Upon the order, therefore, he is not liable.

But the second point is well taken. The order, though not available as a bill of exchange against Strobe for want of acceptance, operated as an equitable assignment of the demand of Wheatley to Howel. It was given for an antecedent debt, and for the full amount of the demand against Strobe; the consideration was valuable, and there was no splitting of the amount due into distinct and different causes of action; and in such cases, it is well settled that an order, whether accepted or not, operates as an assignment of the debt or fund against which it is drawn.

The want of a written acceptance does not affect the right of Howel to the money due, but only the mode of enforcing it. With the acceptance, he could have sustained an action upon the order; without it, he must recover upon the original demand by force of the assignment. Under the old common-law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee; but under our system, it may be brought in the name of the assignee as the party beneficially interested. Courts of law, equally with courts of equity, gave effect to assignments like the one under consideration, by controlling the proceeds of the judgments recovered for the benefit of the assignee: *Mandeville v. Welch*, 5 Wheat. 227; *Corser v. Craig*, 1 Wash. C. C. 427; *Blin v. Pierce*, 20 Vt. 25; *Wheeler v. Wheeler*, 9 Cow. 34; *Nesmith v. Drum*, 8 Watts & S. 9 [42 Am. Dec. 260]; *Robbins v. Bacon*, 8 Greenl. 346; *Adams v. Robinson*, 1 Pick. 461.

After the delivery and presentation of the order, the debt due by Strobe could not be reached on attachment issued by the creditors of Wheatley. As against any attempt by them to enforce its payment upon any such proceeding, the order would be

an effectual protection; and we do not perceive why it should not equally avail as against the suit of the assignor himself, unless it is made to appear that such suit is prosecuted for the benefit of the assignee: *Drake on Attachments*, c. 37; *Black v. Paul*, 10 Mo. 103 [45 Am. Dec. 353]; *Lovely v. Caldwell*, 4 Ala. 684; *Corser v. Craig*, 1 Wash. C. C. 424.

In this state, all actions are required, with some few specified exceptions, to be brought in the name of the real party in interest: Practice Act, sec. 4. In the present case, upon the facts alleged in the answer, and which are admitted by the demurrer to be true, it is clear that the plaintiff is not the real party in interest, and there is no allegation in the complaint that the suit is prosecuted for the benefit of Howel. A judgment recovered by Wheatley after the presentation of the order, without notice to the assignee, would be no protection to the defendant against a suit by the assignee for the same demand.

The position of the defendant is not unlike that of a party summoned as garnishee, after receiving notice of an assignment by his creditor of the demand; if he fails, in answering, to set up the assignment, and judgment in consequence passes against him as a debtor of the assignor, it will not afford protection against a suit by the assignee: *Nugent v. Opdyke*, 9 Rob. (La.) 453; *Crayton v. Clark*, 11 Ala. 787; *Foster v. White*, 9 Port. 221.

Upon the facts set up in the answer, we are of opinion that the prayer of the defendant should have been granted; that he should have had leave to deposit the amount in suit in court, and that process should have issued to bring in Howel, and that Wilcoxson & Co. should have been allowed to intervene.

The rights between the plaintiff and Howel to the demand due by Strobe should be first determined, and afterwards the claim asserted by the intervenors disposed of. This claim, of course, can only be a matter for consideration in case the money is adjudged to have been, at the time of the alleged attachment, the property of Howel: *Van Buskirk v. Roy*, 8 How. Pr. 425.

Judgment reversed, and cause remanded for further proceedings.

TERRY, C. J., and BALDWIN, J., concurred.

BILL OF EXCHANGE OR DRAFT CANNOT, BEFORE ACCEPTANCE, OPERATE AS EQUITABLE ASSIGNMENT of the fund in the drawee's hands: *Harris v. Clark*, 51 Am. Dec. 352; *Chapman v. White*, 57 Id. 464; *Kimball v. Donald*, 64 Id. 200. The principal case, which seems to be opposed to this conclusion, was commented upon and disapproved on this point, in *Bush v. Feste*, 58 Min. 14.

ORDER DRAWN ON SPECIFIC FUND OPERATING AS EQUITABLE ASSIGNMENT: See *Nesmith v. Drum*, 42 Am. Dec. 260; *Palmer v. Merrill*, 52 Id. 782; note to *Field v. Mayor etc. of New York*, 57 Id. 441; *Martin v. Maner*, 70 Id. 223. The principal case is cited in *Commissioners of Bartholomew Co. v. Jameson*, 86 Ind. 165, to the point that where an order is given upon a particular fund it operates as an equitable assignment of so much of the fund as the order specifies.

DEBT OR FUND ASSIGNED BY ORDER, WHETHER SUBJECT THEREAFTER TO ATTACHMENT OR GARNISHMENT: See *Nesmith v. Drum*, 42 Am. Dec. 260, and note collecting prior cases.

CLOUD v. EL DORADO COUNTY.

[12 CALIFORNIA, 128.]

JUDGMENT BY CONFESSION CANNOT BE ATTACKED for intervening errors at the instance of one not a party to the judgment, where it is rendered in open court, upon an allegation of indebtedness, and an appearance by the parties.

MANNER OF EXERCISING JURISDICTION CANNOT MAKE ACTION OF COURT VOID, where the court has jurisdiction both of the parties and the subject-matter.

TITLE OF PURCHASER OF REAL ESTATE AT EXECUTION SALE DOES NOT DEPEND UPON SHERIFF'S RETURN to the writ. The purchaser has no control over the conduct of the officer in this respect.

PURCHASER AT EXECUTION SALE RESTS FOR TITLE UPON JUDGMENT, execution, levy, sale, and deed; and he need show no more to entitle him to whatever rights the defendant in execution had in the property sold.

AUTHORITY OF DEPUTY TO EXECUTE DEED IN NAME OF SHERIFF MUST BE PRODUCED to entitle the deed to be read in evidence in an action for the possession of the land, where the sheriff's term of office had expired at the time of the execution of the deed.

ACTION to recover possession of a lot of land by the purchaser at an execution sale. In July, 1850, judgment was confessed in the district court of Sacramento county, in open court, upon an appearance of the parties, and an allegation of indebtedness by Peter Wimmer and others, in favor of Henley & Co.; and in August an execution was issued thereon, and a sale afterwards made of the premises in question as Wimmer's property. No return on the execution of his proceedings under it after the levy was made by the sheriff. The plaintiff offered and read in evidence a deed of the property dated May 16, 1857, purporting to be executed by William Rogers, by Samuel Todd, deputy. Rogers's term of office had expired some time prior to the execution of this deed, and Todd's authority to execute it did not appear. The county of El Dorado was in possession

of the premises in July, 1851, using them for county purposes. The defendant had judgment, and the plaintiff appealed.

Sanderson and Hewes, for the appellant.

William H. Brumfield, for the respondent.

By Court, BALDWIN, J. Upon the statement in this case several questions arise:

1. It is argued that the judgment confessed by Wimmer et al., in the suit of Henley & Co. against him and others, is void. We think not. The judgment having been rendered in open court upon an allegation of indebtedness, and an appearance by the parties, whatever errors intervened, they cannot, at the instance of any one not a party to the judgment, be invoked to set aside or show the judgment a nullity. The court had jurisdiction both of the parties and the subject-matter, and no manner of exercising that jurisdiction makes void the action of the court. We are not satisfied that under the statute of 1850 (p. 454, sec. 293) there was any substantial error in the proceedings connected with and including the judgment confessed; but it is wholly immaterial whether there were or not, or how many, or how gross, the jurisdiction having attached, the judgment could not be collaterally attacked by a stranger: *Smith v. Randall*, 6 Cal. 47 [65 Am. Dec. 475]; *Low v. Adams*, Id. 277; *Saunders v. Cadwell*, 1 Cow. 622.

2. The next objection by the defendant below is, that there was no return by the sheriff on this execution of his proceedings under it after the levy. But it has been often held that this is not indispensable. While it is undoubtedly the duty of the sheriff to make his return, and while it is important as evidence of a permanent and authentic character that he should do so, the title of the purchase does not depend upon his performance of this duty. The purchaser has no control over the conduct of the officer in this respect; nor is it just or reasonable that he should be responsible for the remissness or negligence of the sheriff in the discharge of such an office. The purchaser rests for title upon the judgment, execution, levy, sale, and deed; and he need show no more to entitle him to whatever rights the defendant in execution had in the property sold. The authorities are uniform, we believe, on this subject: See *Ten Eyck v. Walker*, 4 Wend. 462, and cases.

3. One point taken, however, is fatal to the plaintiff's recovery. The deed purporting to be executed in 1857, long after the expiration of the sheriff's term of office, is signed and

acknowledged by one Todd, as deputy of the sheriff Rogers. But it nowhere appears that he had any authority to execute the deed in the name of the sheriff, or that he was ever the deputy of the sheriff, or ever had anything to do with the levy or sale. No authority is adduced to show that a man, merely by his own act, professing to be the deputy sheriff of another—that other out of office—can, by signing and acknowledging a deed in the name of the old sheriff, give effect to such deed as a conveyance of land sold, or pretended to be sold, under execution, during his principal's term. There is no evidence, except this deed, that this land ever was sold under execution; and the proceedings, so far as they go, seem to have been conducted by a different deputy from Todd. If the old sheriff could, under these circumstances, have given a deed which would have been *prima facie* evidence of the facts it recited—a point we do not decide—certainly a person professing merely to be or to have once been his deputy has no such power under the facts disclosed in the record. If Todd had any authority, either by virtue of his office or otherwise, to execute a deed in the name of Rogers, the authority ought to have been produced.

Judgment is affirmed.

FIELD, J., concurred.

JUDGMENT BY CONFESSION, VALIDITY OF: See *Chappel v. Chappel*, 64 Am. Dec. 496; *Richards v. McMillan*, 65 Id. 521, and the notes thereto. A judgment by confession, however erroneous it may be, cannot be called into question in a collateral proceeding, where the court had jurisdiction of the subject-matter and the parties, and the judgment was entered in open court, and regularly signed by the judge, as prescribed by statute: *Lee v. Figg*, 37 Cal. 336, citing the principal case.

TITLE OF PURCHASER OF REAL ESTATE AT SHERIFF'S SALE DOES NOT DEPEND UPON RETURN, but upon the judgment, execution, sale, and deed: *Ritter v. Scannell*, 70 Am. Dec. 777, and note collecting prior cases; see also *Walker v. McKnight*, 61 Id. 190. The principal case is approved on this point in *Clark v. Lockwood*, 21 Cal. 224; *Moore v. Martin*, 38 Id. 438; *Blood v. Light*, Id. 654.

AUTHORITY OF DEPUTY SHERIFF AFTER EXPIRATION OF SHERIFF'S TERM: See *Tyree v. Wilson*, 58 Am. Dec. 213.

THE PRINCIPAL CASE IS ALSO CITED in *Hill v. Peck*, 30 Cal. 288, to [the point that it is the duty of a sheriff to make a statement or recital of his proceedings in his deed, and a recital so made is entitled to the same effect as an instrument of evidence as the official return on execution, if one is made.

CONNER v. CLARK.

[12 CALIFORNIA, 183.]

PARTY SIGNING PROMISSORY NOTE WITH ADDITION OF WORD "TRUSTEE" TO HIS NAME IS PERSONALLY LIABLE; nor is evidence admissible to show that at the time the note was made there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund.

WRITTEN CONTRACT IS CONSIDERED DEFINITIVE AGREEMENT OF PARTIES, and parol conversations and understandings are all merged in it.

ACTION upon a promissory note. The opinion states the facts.

Winans and Hyer, for the appellant.

John Heard, for the respondent.

By Court, BALDWIN, J. The defendant made his promissory note, signing it "R. C. Clark, Trustee." On the trial he offered to show that the agreement at the time he made it was, that he was not to be personally liable, but that the payment was to be made out of a trust fund of which he was trustee. This evidence was rejected by the court as inadmissible, and the defendant appeals.

It will be perceived that the tendency of the proffered testimony was, in effect, to deny to the note the obligation it imported. The evidence proposed alters so far the contract, as it appears, as to show that instead of Clark's being bound to pay at all events, or individually, he was only to pay out of a particular fund, and of course, not to pay it at all if the fund failed. If the word "trustee" had not been affixed to the signature of Clark, it is clear that no such proof could be made, for it would clearly contradict the writing. It is argued, however, that the addition of this term is sufficient to vary the rule.

Story on Promissory Notes, sec. 63, says: "As to trustees, guardians, executors, and administrators, and other persons acting *en autre droit*, they are by law generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate they act; and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility, by using clear and explicit words to show that intention; but in the absence of such words, the law will hold them bound. Thus if an executor or administrator should make or indorse a note in his own name, adding thereto the words 'as executor' or 'as administrator,' he would be person-

ally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate." Story on Agency, 176, asserts the same doctrine.

The question here is not, as the counsel for the appellant has ingeniously suggested, whether a principal can be bound on an unsealed contract where the writing intimates and notifies, by general words, the fact of agency, and parol evidence explanatory of the fact intimated is given. But here there is no doubt that the person signing as trustee was bound; but he wishes to prove that he was to be bound only in a certain way, that is, to pay out of a particular fund. It is not pretended that any one else was bound by this contract. No authority is shown in Clark to bind the beneficiaries in this trust by this note. In form and legal effect, the note binds him to pay this amount; but he wishes to add to this note another term, namely, that he was only to pay it out of a certain fund; and this he wishes to prove was a contemporaneous parol agreement. But the rule is, that the written contract is considered the definitive agreement of the parties, and parol conversations and understandings are all merged in it. It is the only authentic evidence of the understanding of the parties.

Nor will it do to say that the evidence is admissible as showing a want of consideration for the note. It does not tend to prove that there was no such consideration as is acknowledged by the terms of the note, but that there was no such contract as that alleged.

It is, at last, the common case of an attempt to contradict the terms of a written contract by parol.

Judgment affirmed.

TERRY, C. J., concurred.

PARTY SIGNING PROMISSORY NOTE WITH ADDITION OF WORD "TRUSTEE" IS PERSONALLY LIABLE: *McClure v. Bennett*, 12 Am. Dec. 223; see also *Fogg v. Virgin*, 36 Id. 757; *Traynham v. Jackson*, 65 Id. 152. So if he adds the word "president:" *Chamberlain v. Pacific Wool Growing Co.*, 54 Cal. 106, citing the principal case. As to who may sue on a note payable to "agent," "cashier," "trustee," etc., see *Johnson v. Catlin*, 62 Am. Dec. 622, and note; *Pierce v. Robie*, 63 Id. 614; *Eastern R. R. v. Benedict*, 66 Id. 384.

IN THE MATTER OF THE ESTATE OF KNIGHT.

[12 CALIFORNIA, 200.]

ADMINISTRATOR CANNOT PAY OUT MONEY OF ESTATE TO REMOVE INCUMBRANCES from the property, unless the intestate was bound to pay the money; although a court of chancery might authorize the expenditure to prevent a sacrifice.

ADMINISTRATOR ACTS UPON HIS OWN RESPONSIBILITY if he undertakes to go beyond the strict line of his duty as the law defines it, and while he can receive no profit from a successful issue of his investment, he must bear the loss of failure.

APPEAL by the administrator of the estate of E. Knight, deceased, from a decree of the probate court disallowing a claim. Knight had bought one fifth of a tract of land incumbered by a mortgage for twenty-five thousand dollars. Knight was not personally liable for the money secured. The administrator, acting in good faith, and intending to promote and protect the interest of the estate, in order to prevent a foreclosure, made an arrangement with the mortgagee, by which he was to pay the latter two thousand five hundred dollars cash, and interest on a like sum, the balance of one fifth of the amount of the mortgage. The mortgagee agreed not to foreclose, but as soon as the title should be confirmed by the land commissioners, on payment of the remaining two thousand five hundred dollars, to release and discharge the one fifth of the land held by the estate, from the mortgage. When this arrangement was made, the land had depreciated in value, but it was confidently expected that it would largely appreciate again. The administrator made the cash payment, and continued to pay interest according to his agreement. The title was confirmed, but the land continued to depreciate, and the mortgagee threatened to foreclose. The land was then sold by order of the probate court. A portion of the proceeds, sufficient for the purpose, was applied to the payment of the balance due the mortgagee. The result was a loss of over two thousand four hundred dollars, which sum the administrator claimed to have allowed. The probate court, which had not ordered or sanctioned the arrangement, refused to allow the claim.

Sidney V. Smith, for the appellant.

F. A. Fabens, for the respondent.

By Court, **BALDWIN, J.** This is unquestionably a hard case on the administrator, for he seems to have acted in good faith. But we cannot relax or set aside the rules of law to suit the exigencies of particular cases, or relieve individual instances of hardship.

The statutes of this state do not allow an administrator to pay even the debts due by an intestate, except in a particular way. Certainly they do not allow him to pay money not due by an intestate, upon an idea that the payment might be beneficial to the estate. He is to take care of, manage, and preserve the estate committed to him; but this does not mean that he is, at discretion, to pay off all incumbrances resting on the property, upon the notion that the property may increase in value, and thereby a speculation may be made for the estate. If this were so, an administrator might consume all the assets of the estate in clearing the title to a portion of the property, and then the property might turn out to be valueless, or worth but little. If a case should arise in which a great sacrifice would ensue unless money were paid to discharge an incumbrance, it is not impossible that a court of chancery might order the expenditure of the money needed to remove such incumbrance. The rule of equity is, that a trustee has a right, in questions of responsibility and difficulty, to seek the direction of a court of chancery touching his conduct in the trust, and that the decree of the court is a protection to him. But if he undertakes to go beyond the strict line of his duty as the law defines it, he acts upon his own responsibility; and while he can receive no profit from a successful issue of his investment, he must bear the loss of a failure. It would be a most dangerous precedent to hold that an administrator may speculate with the funds of the estate, or pay charges not allowed by law, though solely with a view of benefiting the estate, and then throw the loss upon the estate, and assign his good intentions as a defense to the injurious consequences of his acts.

The administrator, in the absence of special authority, must administer the estate as he finds it, paying taxes and other necessary expenses, and doing such other acts as are necessary to preserve it as left; he cannot advance money to remove incumbrances, unless his intestate was bound to pay the money. If he takes the responsibility of improving the estate, or bettering the title in this way, it must be at his own risk. The loss cannot be visited upon the heirs, who gave him no authority to cause it. Nor can he ask legal protection when he has himself, though with the best motives, gone beyond the provisions of the law.

The decree of the probate court is affirmed.

TERRY, C. J. concurred.

ADMINISTRATOR MUST BEAR LOSS IN REMOVING INCUMBRANCE, for which the estate is not liable: *Tompkins v. Weeks*, 26 Cal. 61-63, commenting at length, with approval, upon the principal case.

ADMINISTRATOR'S LIABILITY AS TO INVESTMENTS: See *Nyce's Estate*, 40 Am. Dec. 498, and note; *Lamb v. Lamb*, Id. 618; *Keller's Appeal*, 49 Id. 516. An administrator cannot make investments, or satisfy adverse claims, or sell, because the estate would profit by it: *Brenham v. Story*, 39 Cal. 188, citing the principal case.

SMITH v. SMITH.

[12 CALIFORNIA, 216.]

FRAUD UPON WIFE IS NOT COMMITTED by the husband's purchasing lands after marriage with his separate funds acquired before marriage, and taking the conveyance in the names of his minor children by a previous marriage.

ALL PROPERTY ACQUIRED BY EITHER SPOUSE DURING EXISTENCE OF COMMUNITY is presumed to belong to it, and this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and the burden of proof lies upon the party claiming the property as separate.

PRESUMPTION THAT BUILDING IS BUT FORM IN WHICH COMMON PROPERTY IS INVESTED is too cogent to be overcome by loose and unsatisfactory evidence, where it was erected during the existence of the community.

DESIGN OF LAW IN VESTING IN HUSBAND ABSOLUTE POWER OF DISPOSITION OF COMMON PROPERTY was to facilitate its *bona fide* alienation, and to prevent clogs upon its transfer by claims of the wife.

VOLUNTARY DISPOSITION OF COMMON PROPERTY BY HUSBAND, with the view of defeating any claims of the wife thereto, will not be supported by the law.

HOMESTEAD RIGHT CANNOT BE ASSERTED MERELY TO BUILDING, independent of the land upon which the building is erected.

HUSBAND HAS NO CLAIM UPON BUILDING OR ITS PROCEEDS, which he deliberately places upon the lands of his minor children by a former marriage, during the existence of the community. The character of the building as common property is declared only for the protection of the interest of the wife.

ACTION by Augusta J. Smith against Frederick C. Smith for a divorce on the ground of adultery, and for a division of the community property. The divorce was granted, and the question as to property was referred to a referee. At the time of the marriage, in May, 1852, the husband owned property to the value of about sixteen thousand dollars. In October, 1854, he purchased two lots in the city of Sacramento, and took a deed thereof in the names of two minor children by a former marriage. Afterwards the husband, being in affluent circumstances, erected a brick house upon the lots, using funds acquired by him in his business since the marriage, but the

evidence was not clear that any of his separate funds were employed in the building. The building was used as a homestead until November, 1856, when all the parties left the house. At one time the husband declared that the building was to be used as a homestead, and at another that it was placed upon the land of his children to deprive his wife of any claim thereto. The wife alleged fraud by her husband upon her in respect to the property, and made the two children co-defendants in the action. The referee recommended that a decree be entered denying the claims of the plaintiff to the lots, and that the same be confirmed to the children, and a decree was entered accordingly. The plaintiff moved for a new trial, which was denied, and she thereupon appealed from that portion of the decree disposing of the property.

Winans, for the appellant.

John Heard, for the respondent.

By Court, FIELD, J. It is clear that the two lots in question were purchased by the husband with funds owned by him previous to his marriage with the plaintiff. This he expressly states in his examination, and there is nothing disclosed by the record which contradicts his testimony. In this separate property of his the plaintiff possessed no interest which the law could protect so as to restrain his power of absolute disposition, whether by sale or gift. The purchase of the lots, and taking the conveyance in the name of his children by a previous marriage, was not in fraud of any rights of the plaintiff. She had no claim upon the funds thus applied. They were the husband's previous to the marriage, and no interest passed to the wife by that event. The gift to the children was an advancement for their benefit, and was not forbidden by the letter or policy of the law.

But as to the building upon the lots, the case is different. The building was erected long after their purchase, and with funds which constituted common property. It is true, the evidence of the husband tends to show that a portion of the funds thus used were his separate property, but its general effect, when considered in connection with his repeated declarations to different parties, is insufficient to overcome the presumption arising from the fact of the construction being made during the existence of the community.

The law of this state in relation to the rights of husband and wife, as to the common property, is similar to the law of

Louisiana and Texas; and in those states, it is held, by their highest tribunals, that all property acquired by either spouse during the existence of the community is presumed to belong to it, and that this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and that the burden of proof lies upon the party claiming the property as separate: *Lott v. Keach*, 5 Tex. 394; *Huston v. Curl*, 8 Id. 242 [58 Am. Dec. 110]; *Gilhard v. Chessney*, 13 Id. 337; *Chapman v. Allen*, 15 Id. 278; *Claiborne v. Tanner*, 18 Id. 69; *Ford v. Ford*, 1 La. 207; *Dominguez v. Lee*, 17 Id. 290; *Smalley v. Lawrence*, 9 Rob. (La.) 214; *Fisher v. Gordy*, 1 La. Ann. 763; *Webb v. Peet*, 7 Id. 92.

In a case decided at the present term, *Meyer v. Kinzer*, 12 Cal. 237 [post, p. 538], we have had occasion to consider whether the possession of property by either spouse during the existence of the community acquired by purchase created a presumption that the property was common; and we arrived at a conclusion similar to that of the Louisiana and Texas cases, that the presumption of the law is, that all property belongs to the community, which can be repelled only by clear and decisive proof that it was either owned before marriage, or subsequently acquired in one of the particular ways designated in the statute; that is, by gift, bequest, devise, or descent, or was taken in exchange for, or in the investment or as the price of, such property so originally owned or acquired; and that the proof rests upon the party asserting the right.

In the present case, the building was erected during the existence of the community, and the presumption that it was but the form in which the common property was invested is too cogent to be overcome by the loose and unsatisfactory evidence contained in the record. If the separate property of the husband did in fact go into the building, it was essential to the preservation of its separate character that it should have been clearly and indisputably traced by him.

The law, in vesting in the husband the absolute power of disposition of the common property as of his separate estate, designed to facilitate its *bona fide* alienation, and to prevent clogs upon its transfer by claims of the wife; and we are not prepared to say that, under the comprehensive language of the statute, a voluntary settlement or a gift of a portion of the common property, not being unreasonable with reference to the entire amount, the claims against it and the situation of the parties would be invalid. But we think it clear that the law,

notwithstanding its broad terms, will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claims of the wife. The different declarations of the husband respecting the object of the building were conflicting; at one time it was to be used as a homestead, and at another it was placed on the land of his children to deprive the wife of any claim thereto. If the building can be regarded as a homestead of the parties, she has an interest in it which should have been protected; but we do not see how a homestead right can be asserted merely to a building, independent of the land upon which the building is erected. The building is to be regarded only as the form in which common property was invested upon the pretense of the husband of having a homestead, but for the real purpose of defeating any claim the wife might have thereto. The beneficent purposes of the statute could not thus be frustrated, and the right of the wife to one half, upon the dissolution of the marriage, attached.

In *Beard v. Knox*, 5 Cal. 252 [63 Am. Dec. 125], this court held that the common property could not be disposed of by the husband by will, so as to defeat the rights of the surviving wife; and the same doctrine is maintained in *Matter of Buchanan's Estate*, 8 Id. 507. In the first case the court said: "Our statute has done away with the common-law right of dower, and substituted in its place a half-interest in the common property. This liberal provision was intended for the benefit of the wife, and the intention of so humane and beneficent a law should not be defeated by adopting a rule of construction which would leave the future maintenance of herself and family entirely at the caprice of the husband."

Voluntary conveyances, given on the eve of marriage, for the purpose of depriving the intended wife of her right of dower, where that common-law right exists, are fraudulent as against her claim. This was so adjudged in *Swaine v. Perine*, 5 Johns. Ch. 482 [9 Am. Dec. 318]. And upon the same principle, a voluntary disposition by the husband of the common property, or a portion thereof, for the like purpose of depriving the wife of her interest in the same, must be held ineffectual against the assertion of her claim.

It follows, therefore, that the plaintiff, upon the dissolution of the community, was entitled to one half of the building erected out of the funds of the common property; and as the title of the land is vested in the children, the separate value of the house and land should be first determined, and a sale

then decreed of both, with directions to pay to her one half of such proportionate part of the proceeds as the value of the house bears to the entire property, the balance and the proceeds of the land being placed in the hands of guardians of the children, and invested, under the direction of the court, for their benefit. The husband, having deliberately placed the building upon the property of his children, cannot himself have any claim upon it or its proceeds. Its character as common property is declared only for the protection of the interest of the wife.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

TERRY, C. J., and BALDWIN, J., concurred.

ALL PROPERTY ACQUIRED DURING EXISTENCE OF COMMUNITY IS PRESUMED TO BELONG TO IT, and this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of either spouse: *Love v. Robertson*, 56 Am. Dec. 41; *Huston v. Curl*, 58 Id. 110; *Higgins v. Johnson's Heirs*, 70 Id. 394; *Meyer v. Kinzer*, *post*, p. 538, and notes to these cases: *Scott v. Ward*, 13 Cal. 470, citing the principal case; and if a conveyance is by deed of purchase, this fact excludes the supposition of acquisition by gift, bequest, devise, or descent, which would make the property separate property: *Pixley v. Huggins*, 15 Id. 131; *McDonald v. Badger*, 23 Id. 398, both citing the principal case.

VOLUNTARY DISPOSITION OF COMMON PROPERTY BY HUSBAND, with a view of defrauding or defeating the claims of the wife, will not be permitted: *Peck v. Brummagin*, 31 Cal. 447; *De Godey v. Godey*, 39 Id. 164, both citing the principal case; but see it distinguished on this point in *Greiner v. Greiner*, 58 Id. 120. In the absence of a fraudulent intent to defeat the claims of the wife, however, a voluntary disposition of a portion of the property, reasonable in reference to the whole amount, is authorized: *Lord v. Hough*, 43 Id. 585, citing the principal case; and see *Succession of Packwood*, 43 Am. Dec. 230; note to *Thayer v. Thayer*, 39 Id. 220.

THE PRINCIPAL CASE IS ALSO CITED in *Peck v. Brummagin*, 31 Cal. 449, to the point that if a husband uses common property in erecting a house upon land which is the separate property of the wife, the house becomes her separate property; and in *Bartholomew v. West*, 2 Dill. 293, S. C., 8 Nat. Bank. Reg. 14, it is referred to on the point that where land is owned as tenancy in common, a homestead right may be asserted to it in favor of the head of a family, who would otherwise be entitled to the exemption. A controversy growing out of the principal case is reported in *Smith v. McDonald*, 42 Cal. 486.

MEYER v. KINZER.

[12 CALIFORNIA, 247.]

ALL PROPERTY ACQUIRED AFTER MARRIAGE BY EITHER HUSBAND OR WIFE IS COMMON PROPERTY, in California, except such as may be acquired by gift, bequest, devise, or descent.

COMMON PROPERTY MAY BE SOLD OR CONVEYED BY HUSBAND without his wife's joining in the transfer.

PRESUMPTION ATTENDING POSSESSION OF PROPERTY BY EITHER SPOUSE IS THAT IT BELONGS TO COMMUNITY; and this presumption can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterwards by gift, bequest, devise, or descent, or that it is property taken in exchange for, or in the investment or as the price of, the property so originally owned or acquired. The burden of proof rests with the claimant of the separate estate.

PURCHASE WITH SEPARATE FUNDS OF EITHER SPOUSE MUST BE AFFIRMATIVELY ESTABLISHED by clear and decisive proof. In the absence of such proof, the presumption is absolute and conclusive that the property is common property, and it makes no difference whether the conveyance is taken in the name of one or the other, or in the names of both.

FACT OF PURCHASE EXCLUDES SUPPOSITION OF ACQUISITION by gift, bequest, devise, or descent.

ACTION against George W. Kinzer and his wife, Rebecca Kinzer, to extinguish a claim of title by them to certain real estate. Kinzer disclaimed, but his wife set up title by a mortgage upon the premises, and asked that the same be foreclosed for the benefit of her separate estate. Kinzer purchased the premises in question in 1851, after his marriage with Rebecca, and took the conveyance in his own name. In 1853 Kinzer and wife both joined in a deed of the land to one Gager, who, on the same day, executed and delivered to Kinzer and wife a note and mortgage on the land to secure the purchase-money. In 1854 Kinzer transferred the note and mortgage, for a valuable consideration, to one Lemmen, by an assignment, in which his wife did not join. Gager afterwards paid Lemmen the amount of the mortgage and took a discharge, and in 1856 sold and conveyed the property to the plaintiff. The plaintiff had judgment, and Rebecca appealed.

J. B. Hart, for the appellant.

Johnson and Rose, for the respondent.

By Court, FIELD, J. The statute defining the rights of husband and wife provides in its first section that "all property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or

descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, shall be his separate property;" and in the second section, that "all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property;" and by the ninth section, the husband is invested with the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate.

These provisions of the statute are borrowed from the Spanish law, and there is hardly any analogy between them and the doctrines of the common law in respect to the rights of property consequent upon marriage. The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage or subsequently acquired in a particular way. The presumption therefore attending the possession of property by either is, that it belongs to the community; exceptions to the rule must be proved.

The purchase of the premises in question was made by Kinzer in 1851, after his marriage with Rebecca, and the presumption follows, as we have observed, that the property belonged to the community. If the purchase was made with the separate funds of either, that fact should have been affirmatively established by clear and decisive proof. In the absence of such proof, the presumption was absolute and conclusive, and it made no difference whether the conveyance was taken in the name of one or the other, or in the names of both. This results, as we have said, from the language of the statute: "All property acquired after marriage by either, etc., shall be common property." The fact of purchase excludes the supposition of acquisition by gift, bequest, devise, or descent.

The Spanish law, so far as the question involved in the present case is concerned, has been adopted in the states of Texas and Louisiana, and in these states the same presumption is

indulged that the property belongs to the community from the fact of purchase, as will be perceived by an examination of the adjudged cases in their courts. Thus in *Love v. Robertson*, 7 Tex. 11 [56 Am. Dec. 41], the supreme court of Texas held this language: "The presumption that property purchased during the marriage was community property would certainly be very cogent, and would require to be repelled by clear and conclusive proof." In *Huston v. Curl*, 8 Id. 240 [58 Am. Dec. 110], the same court said: "It is the settled doctrine and law that property purchased during the marriage, whether the conveyance be made to the husband or wife separately, or to them jointly, is presumed to belong to the community. This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife, in which case it remains the separate property of the party whose money was employed in the acquisition." And again, in *Chapman v. Allen*, 15 Id. 278, the court said: "The presumption that property purchased during the marriage is community property is very cogent, and can only be repelled by clear and conclusive proof that it was with the individual money or property of one of the parties." Where the property has not been preserved in specie or in kind, but, as in this case, has undergone mutations and changes, it is indispensable to ascertain its separate character, that it be clearly and indisputably traced and identified: See *Lott v. Keach*, 5 Id. 394; *Hemmingway v. Mathews*, 10 Id. 207; *Parker v. Chance*, 11 Id. 513; *Wells v. Cockrum*, 13 Id. 127; *Claiborne v. Tanner*, 18 Id. 69.

To the same effect are the decisions of the supreme court of Louisiana. In *Smalley v. Lawrence*, 9 Rob. (La.) 211, the plaintiff claimed to be the owner of several tracts of land, by purchase from the United States, against a cession by her husband of his property to his creditors. The parties were married in 1839, and the land was bid off at a land sale in 1841, and paid for by the husband, who took the receipts in the name of the plaintiff, and the court said: "The land was purchased during the existence of the community, and although the receipts or certificates are in the name of the wife, still the property as much belongs to the community as if it stood in the name of the husband, unless she can prove that the purchases were made with her own money, or the property given in payment of a debt owing to her in her own right. All property acquired by either spouse during the existence of the commu-

nity the law presumes to belong to it, and is liable for the community debts. If the wife sets up a separate claim, she must make legal proof of it. The title being in her name does not raise even a presumption in her favor." See also *Ford v. Ford*, 1 La. 201; *Davidson v. Stuart*, 10 Id. 146; *Dominguez v. Lee*, 17 Id. 295; *Comeau v. Fontenot*, 19 Id. 406; *Fisher v. Gordy*, 2 La. Ann. 762; *Provost v. Dalahoussaye*, 5 Id. 610; *Prendergast v. Cassidy*, 8 Id. 96; *Webb v. Peet*, 7 Id. 92; *Andrew v. Bradley*, 10 Id. 606; *Forbes v. Forbes*, 11 Id. 326.

This invariable presumption which attends the possession of property by either spouse during the existence of the community can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterwards in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment or as the price of, the property so originally owned or acquired. The burden of proof must rest with the claimant of the separate estate. Any other rule would lead to infinite embarrassment, confusion, and fraud. In vain would creditors or purchasers attempt to show that the particular property seized or bought was not owned by the claimant before marriage, and was not acquired by gift, bequest, devise, or descent, or was not such property under a new form consequent upon some exchange, sale, or investment. In vain would they essay to trace through its various changes the disposition of any separate estate of the wife, so as to exclude any blending of it with the particular property which might be the subject of consideration.

By a statute of Pennsylvania, passed in 1848, the property owned by the wife previous to marriage, and that accruing to her during coverture, by will, descent, deed, or conveyance, or otherwise, are secured to her as a separate estate; and in *Gamber v. Gamber*, 18 Pa. St. 363, the supreme court of the state said: "In the case of a purchase by the wife after marriage, the burden is upon her to prove distinctly that she paid for it with funds which were not furnished by the husband. Unless the rigid proof of her title is always required, no one can calculate the amount of injustice which the act of 1848 will produce;" and in *Keeney v. Good*, 21 Pa. St. 349, the same court held this language: "If the burden of proving that the money was furnished by the husband is thrown upon the creditors, their hope of justice must always be a forlorn one. Thus administered, the act of 1848 would be the worst one ever passed, and the most poisonous to the morals of the peo-

ple. It would hold out constant temptations to families in embarrassed circumstances to commit wrongs of the worst kind, and to uphold them by imposture and falsehood. But there is nothing in the act of 1848 which makes such consequences at all necessary. To bring the property of a married woman under its protection, it is made necessary, by the letter as well as the spirit of the statute, to prove that she owns it. She must identify it as property which was hers before marriage, or show how she came by it afterwards. Evidence that she purchased it amounts to nothing, unless it be accompanied by clear and full proof that she paid for it with her own separate funds. In the absence of such proof, the presumption is a violent one that her husband furnished the means of payment."

It follows, from the views we have taken and the authorities cited, that no presumption arises, as contended by appellant, of a gift or advancement to the wife, from the fact that the note and mortgage were taken in the name of both. The position of the appellant rests upon the authorities of the common law. By them, a conveyance taken in the name of the purchaser, or the joint names of husband and wife, upon a purchase made by the husband alone, would be deemed *prima facie* a gift or advancement to her: *Kingdom v. Bridges*, 4 Vern. 67; *Glaister v. Hewer*, 8 Ves. 199; *Christ's Hospital v. Budgin*, 2 Vern. 683. But even by them the gift, if the property were personal, would only be effectual in case of her surviving him, and he had not in his life-time disposed of it: *Coates v. Stevens*, 1 You. & Coll. 66; *George v. Bank of England*, 7 Price, 646; *Rider v. Kidder*, 10 Ves. 360; *Lucas v. Lucas*, 1 Atk. 270; *Dummer v. Pitcher*, 5 Sim. 35; *Low v. Carter*, 1 Beav. 426.

The common-law authorities are entirely inapplicable under our system. The statute prescribes the effect of the acquisition of property by either spouse, and its operation cannot be defeated or evaded by the form of the conveyance, or the intention of the husband in taking it in the name of his wife. In every form, the community character of the property continues: See *Parker v. Chance*, 11 Tex. 515.

As the case at bar stands, it is clear that the note and mortgage were subject to the disposition of the husband as fully and absolutely as if made to him individually. The note was given for part of the purchase-money of the land, and the mortgage was executed as security for the note. This change in the form of the common property could not affect the con-

trol of the husband over it. The signature of the wife would have added nothing to the validity of the transfer.

Judgment affirmed.

TERRY, C. J., and BALDWIN, J., concurred.

PRESUMPTION IS THAT ALL PROPERTY BELONGS TO COMMUNITY; and this presumption can only be overcome by clear and satisfactory proof that it was owned by the claimant before marriage, or acquired afterwards by gift, bequest, devise, or descent, or that it is property taken in exchange for, or in the investment or as the price of, the property so originally owned and acquired. The principal case has always been regarded as a leading one in California on this proposition: *Smith v. Smith*, 12 Cal. 224, *ante*, p. 533, and note; *Scott v. Ward*, 13 Id. 470; *Pizley v. Huggins*, 15 Id. 131; *Mott v. Smith*, 16 Id. 557; *Kohner v. Ashenauer*, 17 Id. 581; *Burton v. Lee*, 21 Id. 91; *Adams v. Knowlton*, 22 Id. 288; *McDonald v. Badger*, 23 Id. 398; *Ramsdell v. Fuller*, 28 Id. 42. And the burden of proof rests upon the party claiming it to be separate property: *Smith v. Smith* and *McDonald v. Badger*, *supra*. If a conveyance is by deed of purchase, this fact excludes the supposition of acquisition by gift, bequest, devise, or descent: *Pizley v. Huggins* and *McDonald v. Badger*, *supra*; *Tustin v. Faught*, 23 Id. 241; *Landers v. Bolton*, 26 Id. 420. But parol evidence may be introduced to show that it was a deed of gift: *Peck v. Vandenberg*, 30 Id. 42, 55, 61. The principal case is cited in all the above.

HUSBAND'S POWER OVER COMMUNITY PROPERTY: See note *Thayer v. Thayer*, 39 Am. Dec. 220; *Wright v. Hays*, 60 Id. 200; *Beard v. Koon*, 63 Id. 126; *Smith v. Smith*, *ante*, p. 533, and the notes thereto.

HUNTER v. WATSON.

[12 CALIFORNIA, 363.]

GRANTEE'S FAILURE TO RECORD DEED DOES NOT ABSOLUTELY AVOID IT as to third persons, under the California registration act. The failure to record only protects *bona fide* purchasers for a valuable consideration.

POSSESSION OF REAL ESTATE, OPEN AND NOTORIOUS, BY ONE HOLDING UNRECORDED DEED, is evidence of notice to a subsequent purchaser of the first grantee's title; but the possession must exist at the time of the acquisition of title or deed of the subsequent grantee from the common grantor.

DEED TO ONE WHO IS DEAD AT TIME OF EXECUTION IS NULLITY.

WORD "HEIRS" IN CONVEYANCE IS NOT WORD OF PURCHASE, carrying title to the heirs, but only qualifying the title of the grantee.

DEED MADE BY AGENT CANNOT BE ASSAILED FOR WANT OF AUTHORITY TO EXECUTE IT, where it is executed under a general power of attorney, by which the agent is authorized "to make and execute conveyances," and where the purchase-money is received by the principal.

CREDITORS, AS SUCH, ARE NOT INCLUDED WITHIN PROVISIONS OF CALIFORNIA REGISTRATION ACT; but a judgment creditor purchasing at his own sale, without notice, is a *bona fide* purchaser within the act.

KNOWLEDGE OF AGENT, IN COURSE OF AGENCY, IS KNOWLEDGE OF PRINCIPAL.

ATTORNEY IS NOT PERMITTED TO DISCLOSE CONFIDENTIAL COMMUNICATIONS OF CLIENT; but if he acquires information apart from or independent of such source, he is not protected from disclosing it.

ACTION to recover possession of a lot of land in the city of Sacramento. The plaintiff, Hunter, recovered a judgment on October 11, 1855, against William Glenn, and became the purchaser at execution sale of the lot, the title of which at that time stood upon the records in Glenn's name. A deed of the property had been made to Glenn by one Forbes, who desired to hide it from his creditors. Glenn, upon leaving the state, gave his brother Thomas a general power of attorney to transact the former's business in California, and authorized the latter "to make and execute conveyances." Thomas Glenn, acting under this power of attorney, conveyed the lot to one Knox, by a deed dated September 20, 1851, and Forbes received the purchase-money. The deed was not recorded. Knox died in 1854. On March 22, 1856, Glenn executed another deed of the lot to Knox and his heirs, and this deed was recorded March 27, 1856. Knox's administrator was in notorious possession of the property at the time of the plaintiff's purchase, and Knox himself had gone into possession after his purchase, and had made permanent and valuable improvements. Certain evidence tending to show the plaintiff's knowledge of Knox's deed appears in the opinion. The defendants held under a lease from Knox's administrator. The plaintiff had judgment, and the defendants appealed.

Crocker and Robinson, for the appellants.

Moore and Welty, for the respondent.

By Court, BALDWIN, J. We have given the important questions raised by the record our most serious attention. The amount involved in this particular case is not considerable, but the principles are of the greatest importance. The questions are not free from difficulty; indeed, they are full of embarrassment, arising not only from several decisions of our own court, which, to say the least, do not seem altogether consistent, and from the conflicting nature of the decisions in other states and in Great Britain. Upon no subject is it more important that the law should be beyond doubt as to its construction, and simple and precise in its provisions. And it may well merit legislative consideration, whether the statutes of

registration should not be thoroughly revised, so as to secure uniform and certain rules for the disposition and protection of real estate in the future.

It is not necessary to review the various decisions of this court. The questions we are considering turn upon the proper construction of the twenty-fourth and twenty-sixth sections of the recordation act of 1850. This is the language of the twenty-fourth section, as amended in 1855: "Every conveyance of real estate, and every instrument of writing, setting forth an agreement to convey any real estate, or whereby any real estate may be affected, proved, acknowledged, and certified in the manner prescribed in this act, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such record."

The twenty-sixth section is as follows: "Every conveyance of real estate within this state, hereafter made, which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

It would seem that the legislature designed in the twenty-fourth section to hold that the recording of the deed was necessary to give notice of it to third persons, and supposed that the want of such notice invalidated the deed as to them; but that afterwards the twenty-sixth section was inserted, which was intended to qualify and limit the effect of this provision. The twenty-sixth section is taken from the legislation of New York on that subject, and is in the words of a section of a statute of that state. Taking both sections together, it seems evident that the true construction is, that the failure of a grantee to record a deed does not absolutely and without exception avoid the deed as to third persons; for if it did, it is impossible to give effect to the words "*bona fide* purchaser for a valuable consideration." The failure to register only protects this class of persons. Under the registration laws of England and the American states (which did not contain this limitation), courts of equity ingrafted this exception, and held in numerous cases that the purchaser of lands, knowing them to have been before sold by the vendor, though the deed was not recorded, was not within the protection of the statute: See *Jackson v. Burgott*, 10 Johns. 457. The Irish registry act

makes no exception or qualification, but the record is the only notice; and in some of the states—Massachusetts, Maine, and perhaps others—actual notice is the only substitute for the notice by the registry.

The question arises, Who is a *bona fide* purchaser, or what is a *bona fide* purchase? And this inquiry has been the fruitful source of difficulty and contention, and conflicting decision. *A priori* it might, perhaps, be considered not a little difficult to say that a party buying land in the possession of another must necessarily be a fraudulent purchaser, especially when he buys with a record proof before him of the ownership of his vendor. It could scarcely be held that such a purchaser must necessarily know that the vendor had no title, and that the possessor had. Some of the cases hold that mere possession is actual notice, and will not suffer any proof to be made to the contrary; other, and perhaps the greater number, hold that it is only a presumption of notice, which may be rebutted; and others again hold that possession is not so much notice of the title of the holder as a circumstance which should put the purchaser on inquiry, and if he fails to inquire, he is no more protected than if he had inquired and ascertained the fact.

In New York, the cases are by no means harmonious—the earlier cases holding with more strictness to the doctrine of notice than those of later date. It must be conceded, however, that the authorities, not only in New York but elsewhere, are overwhelming to the point that possession is proof of notice—whether *prima facie* or absolute, it is not necessary to inquire here—of the title of the possessor. This is the doctrine of the supreme court of the United States, and of every state in the Union with the three or four exceptions.

It is urged against this array of authority, that this matter of possession is a fact, not a principle; that the fact must have its force in different states or places, according to circumstances; that this fact in England or Massachusetts, owing to local circumstances, has a significance which is denied by the circumstances prevailing here; that in the older states, titles are settled and easily understood, but that the reverse of this stable condition of affairs characterizes our younger and unsettled state; and that besides this, we have a statute unknown to those states allowing the purchase of land in adverse possession; that in addition to this, much of the real estate of the country is held by disputed titles, and no considerable portion by no pretense of it. The force of this argument is conceded; but something may be urged on the other side. Some latitude

should probably be indulged in a new state, whose people, hastily gathered together, are, many of them, unfamiliar with their own laws; and it is not strange that, under the peculiar circumstances which surround them, great negligence and laxity in the transaction of business, both in individuals and public officers, prevailed; and hence much that may be attributed to ignorance, carelessness, and accident prevented the preservation and protection of land titles. But besides this, we do not see enough in these suggestions to induce us to disregard an array of authority so formidable.

We acknowledge the weight of the considerations of public policy which suggest that land titles should be made to depend upon written and record proof, with few exceptions, and to leave as little to parol proof as possible; and especially do we acknowledge the paramount importance of establishing clear, precise, and definite rules in respect to contracts and property—such rules as furnish of themselves authentic guides to courts and juries, and give to the citizen certain ideas of his rights, and leave as little as possible to litigation or the discretion of the judge. But this policy addresses itself to the legislature, and we cannot give effect to it in this case, in the face of a clear persuasion that the law, as it is written, is otherwise.

We must therefore hold, in obedience to this authority, that the open, notorious possession of real estate, by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title. To guard against misapprehension, we say that the possession must exist at the time of the acquisition of title or deed of the subsequent vendee, from the common vendor.

It appears by the express finding of the court that Knox, the vendee of Glenn, entered into possession of the premises after his purchase in 1851, and made permanent and valuable improvements; that up to the time of his death, he was in possession, as was his administrator after his death, until after the purchase by Hunter. The finding is, that the administrator was in "the notorious possession of the property at the time of the plaintiff's purchase." But it is by no means clear, from the evidence, whether the judge, in his findings, meant to assert that this was a personal possession, or possession by a tenant or tenants; for the finding is, that defendants hold under a lease from Knox's administrator. When the lease commenced does not appear. The other evidence introduced to show knowledge by Hunter of the deed from Glenn to Knox was, taken alone, clearly insufficient: *Wyatt v. Barwell*, 19 Ves.

435; *Jolland v. Stainbridge*, 3 Id. 478; *Scott v. Gallagher*, 14 Serg. & R. 333 [16 Am. Dec. 508].

The deed of 1856 may be laid out of the question. It was made after the death of Knox. and though made to him and "his heirs," the word "heir," is not a word of purchase, carrying title to the heirs, but only qualifying the title of the grantee. A deed to a dead man is a nullity.

The deed of 1851, at the instance of Forbes, is attacked. The deed was executed under a power from Glenn, very general in its terms, and evidently intended to give to the attorney authority to act for the principal in respect to the latter's business in California; it authorized the attorney "to make and execute conveyances." The money was received by Forbes, and the execution of the deed seems to have been approved by Glenn. We think, therefore, that this deed cannot be assailed for want of authority to execute it. It was not recorded.

If Hunter had legal notice of this deed, we think it was enough to defeat his purchase.

The statute of California, already cited, only protects purchasers; creditors, as such, do not seem to be included within its provisions; but a judgment creditor, purchasing at his own sale without notice, is a *bona fide* purchaser within the act. The cases are not agreed upon this subject, but the weight of authority and the reason of the rule are as we have stated it: *Jackson v. Town*, 4 Cow. 599 [15 Am. Dec. 405]; *Jackson v. Post*, 15 Wend. 588; *Jackson v. Chamberlain*, 8 Id. 620; *Waldo v. Russell*, 5 Mo. 387; *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866; *Scribner's Lessee v. Lockwood*, 9 Ohio, 184; *Mann's Appeal*, 1 Pa. St. 24.

Upon the trial, Mr. D. W. Welty, the attorney for the plaintiff, was examined as a witness for the defendant, to prove that while he was acting as agent for plaintiff, he ascertained the facts in relation to the title or claim of Knox to this property. Though this examination was not very regular, yet we are inclined to think the witness should have answered the general question, or protected himself by his privilege, or that of his client. It is clear that the knowledge of the agent in the course of the agency is the knowledge of the principal; and while the attorney is not permitted to disclose the confidential communications of his client, yet if he acquires information apart from any such communications, he is not protected from disclosing it. We do not understand that the witness was required to state any facts derived from statements of his client, but merely

to state facts coming to his knowledge from independent sources.

The judgment is reversed, and the cause remanded for a new trial.

FIELD, J., concurred.

TERRY, C. J. I dissent, for reasons which I shall file hereafter.

UNRECORDED DEED, GOOD BETWEEN PARTIES AND PURCHASERS WITH NOTICE: *Voss v. Morton*, 50 Am. Dec. 750; *Draper v. Bryson*, 57 Id. 257; *Reinhart v. Miller*, 68 Id. 506, and prior cases in the notes thereto.

POSSESSION AS NOTICE OF OCCUPANT'S TITLE: See *Beatie v. Butler*, 64 Am. Dec. 234; *Bryan v. Ramirez*, 68 Id. 340; *Wyatt v. Elam*, Id. 518; *Vaughn v. Tracy*, 69 Id. 471; *Moore v. Pierson*, 71 Id. 409. Open and notorious possession of real estate is sufficient to put a purchaser upon inquiry as to the interest, legal or equitable, of the occupant: *Woodson v. McCune*, 17 Cal. 304; *Eldridge v. See Yup Co.*, Id. 56; *Havens v. Dale*, 18 Id. 367; *Lestrade v. Barth*, 19 Id. 676; *Dutton v. Warschauer*, 21 Id. 628; *Daubenspeck v. Platt*, 22 Id. 335; *Landers v. Bolton*, 26 Id. 419; *Fair v. Stevenot*, 29 Id. 490; *Pell v. McElroy*, 36 Id. 271, all citing the principal case; but possession of a tenant is not notice of his landlord's title: *Smith v. Dall*, 13 Id. 512, also citing the principal case.

PURCHASER AT SHERIFF'S SALE IS PURCHASER WITHIN MEANING OF RECORDING ACTS: *Wood v. Chapin*, 67 Am. Dec. 62, and note; *Draper v. Bryson*, 69 Id. 483.

DEED TO PERSON NOT THEN LIVING AND TO HIS HEIRS IS VOID: *Ready v. Kearsley*, 14 Mich. 225; but a deed to S. or his heirs is a valid conveyance to S. if he be living, and to his heirs if he be dead—citing the principal case.

EXTENT OF AUTHORITY UNDER POWERS OF ATTORNEY: See *Chilton v. Willford*, 60 Am. Dec. 399, and note referring to other decisions. See the principal case referred to in the construction of a power of attorney, in *De Rette v. Muldrow*, 16 Cal. 512.

NOTICE TO AGENT, IN COURSE OF AGENCY, IS NOTICE TO PRINCIPAL: *Weisser v. Denison*, 61 Am. Dec. 731, and note referring to prior cases; *Bachman v. Wright*, 65 Id. 187; *Farmers' etc. Bank v. Payne*, 68 Id. 362.

COMMUNICATION BY CLIENT TO ATTORNEY, WHEN PRIVILEGED: See *Thompson v. Kilborne*, 67 Am. Dec. 742, and note; *Alderman v. People*, 69 Id. 321. The rule that an attorney cannot be compelled to disclose communications made to him in that capacity does not extend to any facts within his knowledge, or information acquired by him in any other way than by confidential communications of his client: *Gallagher v. Williamson*, 23 Cal. 333, citing the principal case.

PICO v. COLUMBET.

[12 CALIFORNIA, 414.]

TENANT IN COMMON CANNOT MAINTAIN ACTION AT COMMON LAW AGAINST CO-TENANT, in sole possession of the premises, to recover a share of the rents and profits, unless the defendant occupies the premises as bailiff or receiver of the plaintiff's interest, by agreement; and this rule prevails in California, since the statute of 4 & 5 Anne, c. 16, has not been adopted. A complaint, therefore, in the form of a common-law action of account, is fatally defective if it does not allege such occupation.

OCCUPATION OF TENANT IN COMMON IS, AT COMMON LAW, BUT EXERCISE OF LEGAL RIGHT, so long as he does not exclude his co-tenant. His cultivation and improvement are made at his own risk: if they result in loss, he cannot call upon his co-tenant for contribution; and if they produce a profit, his co-tenant is not entitled to share in them. The co-tenant can, at any moment, enter into equal enjoyment of his possession, and his neglect to do so may be regarded as an assent to the sole occupation of the other.

ACTION, IN FORM OF EQUITY SUIT, WILL NOT LIE BY TENANT IN COMMON AGAINST CO-TENANT, in sole possession of the premises, to recover a share of the profits resulting from the labor and money of the defendant, when the plaintiff has expended neither, and has never claimed possession, and never been liable for contribution in case of loss.

ACTION by one tenant in common against his co-tenant, who is in sole possession of the premises, to recover a share of profits of the estate. The facts are stated in the opinion.

Stow and Brown, for the appellant.

Holladay and Cary, for the respondent.

By Court, FIELD, J. This action is brought by one tenant in common against his co-tenant, who is in the sole possession of the entire premises, to recover a share of the profits received from the estate. The case was argued upon the demurrer to the complaint, which, by stipulation of the parties, was admitted to have been taken on the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues, and profits thereof; a demand by the plaintiff of an account of the same and the payment of his share; the defendant's refusal; and that the rents, issues, and profits amount to eighty-four thousand dollars. These averments, and not the form in which the prayer for judgment is couched, must determine the character of the pleading. The complaint is designated a bill in equity, but the designation does not make it such. There are

no special circumstances alleged which withdraw the case from the ordinary remedies at law, and require the interposition of equity. The action is a common-law action of account, and, viewed in this light, the complaint is fatally defective. It does not aver that the defendant occupied the premises upon any agreement with the plaintiff, as receiver or bailiff of his share of the rents and profits. It is essential to a recovery that this circumstance exist, and equally essential to the complaint that it be alleged. By the common law, one tenant in common has no remedy against the other who exclusively occupies the premises and receives the entire profits, unless he is ousted of possession, when ejectment may be brought, or unless the other is acting as bailiff of his interest by agreement, when the action of account will lie. The reason of the doctrine is obvious. Each tenant is entitled to the occupation of the premises; neither can exclude the other; and if the sole occupation by one co-tenant could render him liable to the other, it would be in the power of the latter, by voluntarily remaining out of possession, to keep out his companion also, except upon the condition of the payment of rent. The enjoyment of the absolute legal right of one co-tenant would thus often be dependent upon the caprice or indolence of the other: 1 Co. Lit. 200; 5 Bac. Abr. 867; Willes, 209.

The statutes of 4 & 5 Anne, c. 16, give a right of action to one joint tenant, or tenant in common, against the other as bailiff, who received more than his proportional share of the profits. At common law, the bailiff was answerable, not only for his actual receipts, but for what he might have made from the property without willful neglect: Co. Lit. 172 a; Willes, 210; but as bailiff under the statute of Anne, he was responsible only for what he received beyond his proportionate share. That statute only applied to cases where one tenant in common received from a third person money, or something else, to which both co-tenants were entitled by reason of their co-tenancy, and retained more than his just share according to the proportion of his interest. This was held in *Henderson v. Eason*, 9 Eng. L. & Eq. 837. In that case, it was decided that if one of two tenants in common solely occupies land, farms it at his own cost, and takes the produce for his own benefit, his co-tenant cannot maintain an action of account against him as bailiff for having received more than his share and proportion.

The statute of Anne has never been adopted in this state, nor have we any similar statute. The case at bar must therefore be determined upon the principles of the common law.

By them, as we have observed, the action cannot be maintained against the occupying tenant unless he is by agreement a manager or agent of his co-tenant. The occupation by him, so long as he does not exclude his co-tenant, is but the exercise of a legal right. His cultivation and improvements are made at his own risk: if they result in loss, he cannot call upon his co-tenant for contribution; and if they produce a profit, his co-tenant is not entitled to share in them. The co-tenant can at any moment enter into equal enjoyment of his possession; his neglect to do so may be regarded as an assent to the sole occupation of the other.

On this point, the observations of Baron Parke in *Henderson v. Eason*, *supra*, are pertinent, although that case arose under the statute of Anne. "There are obviously many cases," says the justice, "in which a tenant in common may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything. For instance, if a dwelling-house or room is solely occupied by one tenant in common without ousting the other, or a chattel is used by one tenant in common and nothing is received, it would be most inequitable to hold that by a simple act of occupation or user, without any agreement, he should be liable to pay a rent, or anything in the nature of a compensation, to his co-tenant for that occupation, to which, to the full extent to which he enjoyed, he had a perfect right. It appears impossible to hold such a case to be within the statute, and an opinion to that effect was expressed by Lord Cottenham in *McMahon v. Burchell*, 2 Ph. 127. Such cases are clearly out of the operation of the statute. Again, there are many cases where profits are made, and are actually taken by one co-tenant, yet it is impossible to say that he has received more than comes to his just share. For instance, if one tenant employs his capital and industry in cultivating the whole of the piece of land, the subject of the tenancy, in a mode in which the money and labor expended greatly exceeds the value of the rent or compensation for the mere occupation of the land, in raising hops, for example, which is a very hazardous adventure, and he takes the whole of the crops, is he to be accountable for any of the profits in such a case, where it is clear, if the speculation had been a losing one altogether, he could not have called for a moiety of the loss, as he would have been enabled to do had it been so cultivated by the

mutual agreement of the co-tenants? The risk of the cultivation, and the profits and the loss, are his own, and what is just with respect to the very uncertain and expensive crop of hops is also just with respect to all the produce of the land, the *fructus industriales*, which are raised by the capital and industry of the occupier, and cannot exist without it. In taking all the produce, he cannot be said to receive more than his just share and proportion to which he is entitled as tenant in common, as he receives in truth the remuneration for his own labor and capital, to which a tenant has no right."

The American cases are to the same effect. In *Sargent v. Parsons*, 12 Mass. 149, the court said: "The action of account is maintainable only against a bailiff; and a bailiff can only be one who is appointed such, or who is made such by the law, which latter instance applies only to a guardian, who is bailiff of his ward, and who is liable not only for rents and profits actually received, but also for those which he might have received by a proper management of the estate. One tenant in common may by contract make another his bailiff or receiver; and if he does, he may bring him to account in this form of action; and probably, also, to avoid a process considered in some degree troublesome, might sue him in *indebitatis assumpsit*, as on a promise to account. But this must be for rents and profits actually received beyond his share; for, by the common law, no remedy is for a mere sole use and occupation by one of the tenants; for it is in the power of each tenant at any time to occupy, and the not doing it by one would look like an assent that the other should occupy the whole."

In *Woolver v. Knapp*, 18 Barb. 265, the defendant had enjoyed the sole possession of a farm for five years, the rent and occupation of which was worth two hundred dollars a year. The plaintiffs were his co-tenants, and brought their action of account. The court decided that the action could not be sustained, holding that one tenant in common who possesses the entire premises, without any agreement with his co-tenants as to his possession, or any demand on their part to be allowed to enjoy the same with him, is not liable to account in an action for their use and occupation: See also *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 139 [23 Am. Dec. 387].

We have treated this case as an action of account at law, but to the same result we should come if the proceeding were in equity. There is no equity in the claim asserted by the plaintiff to share in profits resulting from the labor and money of the defendant, when he has expended neither, and

has never claimed possession, and never been liable for contribution in cases of loss. There would be no equity in giving to the plaintiff, who would neither work himself nor subject himself to any expenditures or risks, a share in the fruits of another's labor, investments, and risks.

The cases to which our attention has been called in which equity has sustained an account in favor of one tenant in common out of possession, against his co-tenant in possession, for the rents and profits, are with some exceptions in the court of appeals of South Carolina, those in which the account was a collateral incident to a claim for partition, and the rents and profits claimed were due from the defendant as a tenant of the plaintiff's interest, or were received by him when they belonged to both parties, or were the proceeds of their joint labor and expenditures. Thus in *Pope v. Haskins*, 16 Ala. 321, the defendant had leased of the complainant his undivided one-third interest in a lot belonging to the parties as tenants in common, and upon the expiration of the lease had rented out the lot to a third party and received the entire profits, and the bill was filed to obtain an account of the rents and profits, and for a partition of the property.

In *Hannan v. Osborn*, 4 Paige, 336, the bill was filed for the partition and sale of a lot of land, and an account of the rents and profits, and the account directed was of the rents and profits received by any of the parties, not of the profits made in the use and occupation of the premises.

In *Turner v. Morgan*, 8 Ves. 143, the bill prayed partition of a house at Portsmouth, and an account of the rent, under the following circumstances: The house was decreed to three persons, equally to be divided. The plaintiff purchased two thirds. The defendant was tenant of the house under a lease of (£22) twenty-two pounds a year, and refusing to raise the rent, the plaintiff brought ejectment for his two thirds. The ejectment was defeated, the defendant purchasing the remaining third. Upon this the bill was filed. The chancellor allowed a partition. No question appears to have been made upon the right of the plaintiff to an account, the defendant having been tenant under the lease; and the chancellor observed, in relation to the account, that there was a possible distinction between the time during which the defendant was tenant and the time since he became owner, but that justice would be answered by inquiring what would have been a reasonable rent in each year the account was sought.

The doctrine laid down by the court of appeals of South Carolina, as to the liability of one co-tenant to another, is believed to be peculiar to that court. In *Hancock v. Day*, 1 Mo-Mull. Eq. 69 [36 Am. Dec. 293], *Thompson v. Bostick*, Id. 75, and *Holt v. Robinson*, Id. 475, it was held that as between tenants in common, the occupying tenant is liable for rent of so much of the premises as was capable of producing rent at the time he took possession, but not liable for that which was rendered capable by his labor. The reasons upon which these decisions rest do not commend themselves to our judgment, and are insufficient to overcome the force of the English, Massachusetts, New York, and Kentucky authorities.

The demurrer should have been sustained; but as the same result was obtained by a judgment rendered for the defendant on the merits of the case, it will be sufficient to direct the affirmance of the judgment.

TERRY, C. J., and BALDWIN, J., concurred.

TENANT IN COMMON, WHEN LIABLE TO ACTION AT LAW TO RECOVER SHARE OF RENTS AND PROFITS: See *Dickinson v. Williams*, 59 Am. Dec. 142; *Shepard v. Richards*, 61 Id. 473, and notes to these cases; *Moss v. Ross*, 66 Id. 250; *Pect v. Carpenter*, Id. 477. A tenant in common is not liable to his co-tenants for the use and occupation of the common property, in the absence of an agreement with them to pay rent, or of an ouster: *Reynolds v. Wilmoth*, 45 Iowa, 695; *Israel v. Israel*, 30 Md. 125, 127, citing the principal case. But while a co-tenant is not liable for rents and profits made by him, while in sole occupancy, he is liable for rents and profits received by him from others: *Howard v. Throckmorton*, 59 Cal. 86; *Abel v. Love*, 17 Id. 237, explaining the principal case.

TENANT IN COMMON, WHEN LIABLE TO ACCOUNT IN EQUITY FOR RENTS AND PROFITS: See *Nelson's Heirs v. Clay's Heirs*, 23 Am. Dec. 387; *Ruffners v. Lewis's Ex'rs*, 30 Id. 513; *Hancock v. Day*, 36 Id. 293, and notes to these cases; *Puckett v. Smith*, 53 Id. 686; *Tarleton v. Goldthwaite's Heirs*, 58 Id. 296; *Huff v. McDonald*, 68 Id. 487; *Isard v. Bodine*, 69 Id. 595. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his co-tenant in possession to account for rents and profits received by him from tenants of the premises: *Goodnow v. Sheer*, 16 Cal. 471, explaining the principal case.

DECK v. GERKE.

[12 CALIFORNIA, 432.]

JURISDICTION OF PROBATE COURT OVER TESTAMENTARY AND PROBATE MATTERS IS NOT EXCLUSIVE. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains its jurisdiction.

COURT OF CHANCERY MAY TAKE JURISDICTION OF SETTLEMENT OF ESTATE, when there are peculiar circumstances of embarrassment to its admin-

istration, and when the assuming of jurisdiction would prevent great delay, expense, inconvenience, and waste, and thus conclude, by one action and decree, a protracted and vexatious litigation.

ACTION in a district court, as a court of equity, praying the settlement of an estate, distribution, and the appointment of a receiver. The plaintiffs, who claimed to be the heirs and distributees of one Auguste Deck, deceased, alleged that the defendant Gerke had not settled his accounts as administrator of the estate, and that he was largely indebted on account of his administration; that Gerke was removed as administrator by the probate court, and one Samuel Flower was appointed in his place; that upon appeal, this order was reversed in part, but not in respect to the removal; that Gerke still claims to be administrator; and that one Robert C. Rogers succeeded Flower as general administrator, and without further authority had seized upon a portion of the assets of the estate. The complaint further alleged that a certain woman, who claimed to have been Deck's wife, sets up an unfounded claim to the estate; and that she also claims that her infant child is Deck's child, and entitled, as heir, to the estate, but that the claim is unfounded. A demurrer to the jurisdiction of the district court was sustained, and the plaintiffs appealed.

Heydenfeldt, for the appellants.

Daniel Rogers, for the respondent Rogers.

By Court, BALDWIN, J. Apart from the previous decisions of this court, it might be questioned whether the probate court, under our constitution, did not possess an exclusive jurisdiction over testamentary and probate matters: *Blanton v. King*, 2 How. (Miss.) 856; *Carmichael v. Browder*, 2 Id. 252; *Foras v. Graves*, 4 Smed. & M. 707. But this court has recognized a different rule. In *Clarke v. Perry*, 5 Cal. 60 [63 Am. Dec. 82], it was held: "The probate court is a court of special and limited jurisdiction. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains all its jurisdiction. Where, therefore, a bill is filed in chancery against an administrator to compel him to account, by one who has not been an actual party to a proceeding or settlement in the probate court, he may totally disregard such proceeding or settlement; and although the settlement in the probate court is a final settlement, the complainant, who was no party to it, may treat it as a nullity, and proceed to invoke the equitable powers of the district court, and compel the administrator to

a full account." And in *Sanford v. Head*, Id. 298, the same doctrine was reaffirmed in emphatic terms. The ground upon which equity took jurisdiction in England in such cases was, that the spiritual courts were not able from their constitution to afford adequate and complete relief: 1 Story's Eq. Jur., secs. 530 et seq. Though much of the reason of this rule is removed in most of the states of the Union where probate courts exist, yet the power of the chancery court to interpose for the settlement of accounts and the enforcement of trusts of this sort is maintained. Under the decisions of this court, chancery has assumed jurisdiction over such subjects, and as probably rights have vested under their decrees, and the principle asserted is more convenient in practice, we think it is not permissible now to question the jurisdiction. This case is peculiarly fitted for the exercise of this equitable power; for the estate seems to be in confusion, and matters connected with its settlement complicated, requiring from the probate court, and probably afterwards from other courts, various expensive and tedious proceedings; whereas all these questions may be determined in a single action, and this protracted and expensive litigation brought to a termination within a reasonable period. The court can direct or decide the appropriate issues, refer the various accounts, and make the proper decree of settlement or distribution.

The fact that there is a suit now pending between the alleged widow and the heirs is no bar; for this proceeding, embracing the whole subject touching the estate, involves also, as a part of it, this litigation; besides, it does not appear by the bill that the parties to this bill are the same as in that case. Nor is the objection well taken that these matters being before the probate court, and that court having concurrent jurisdiction, chancery will not interpose. The entire controversy and all these parties are not charged to be before the probate court; and if they were in different aspects, and in several portions of the subject, yet this seems to us to be the best mode of solving and settling the whole controversy; and perhaps, on this ground alone, and to prevent multiplicity of suits, chancery having control of the general subject, the jurisdiction of that forum could be maintained.

It is not necessary to hold, nor do we hold, that chancery has jurisdiction to open an account or other matter settled by the probate court, except under peculiar equitable circumstances; nor do we decide that the district court may withdraw

from the probate court, under ordinary circumstances, the settlement of an account, or the power of distributing an estate; but, limiting ourselves to the case before us, we hold that the district courts may take jurisdiction of the settlement of an estate, or of a trust of this sort, when there are peculiar circumstances of embarrassment to its administration, and when the assuming of jurisdiction would prevent great delay, expense, inconvenience, and waste, and thus conclude, by one action and decree, a protracted and vexatious litigation. We see no necessity for the appointment of a receiver in such a case as this, as, upon the facts stated in the bill, no difficulty should exist in determining which is the rightful administrator of several claiming the office, and no complaint is made as to the sufficiency of the bonds of any one.

Judgment reversed, and cause remanded for further proceedings.

FIELD, J., concurred.

JURISDICTION OF CHANCERY, HOW FAR DIVESTED IN GENERAL BY PROBATE SYSTEM.—The question is somewhat considered in the note to *Green v. Creighton*, 48 Am. Dec. 744. As to the jurisdiction of chancery over the administration of estates generally, see *Mills v. Lumphin*, 44 Id. 677 (Ga.); *Grattan v. Grattan*, 65 Id. 726 (Ill.); and see *Newby v. Skinner*, 31 Id. 397; *Leigh v. Smith*, 42 Id. 182 (N. C.); to compel the execution of trusts: *Wade v. American Colonisation Society*, 45 Id. 324 (Miss.); over the settlement of executors' and administrators' accounts: *Clarke v. Perry*, 63 Id. 82 (Cal.); *Brackenridge v. Holland*, 20 Id. 123 (Ind.); *Jennison v. Hapgood*, 19 Id. 258; *Sever v. Russell*, 50 Id. 811 (Mass.); *Green v. Creighton*, 48 Id. 742 (Miss.); and note considering the subject; *Salter v. Williamson*, 35 Id. 513; *Black v. Whittall*, 59 Id. 423 (N. J.); and over infants and guardians: *Cowles v. Cowles*, 44 Id. 708; *Grattan v. Grattan*, 65 Id. 726 (Ill.); *Thompson v. Boardman*, 18 Id. 684 (Vt.), and note. In some states the orphans' or probate court possesses equity powers: *Powell v. North*, 56 Id. 513 (Ind.); *McPherson v. Caniff*, 14 Id. 642; *App v. Driesbach*, 21 Id. 447; *Chess's Appeal*, 45 Id. 668 (Pa.); and see also *Jones v. Taylor*, 56 Id. 48 (Tex.), and note 58; and as to the general exclusive jurisdiction of these courts, see *Apperson v. Cottrell*, 29 Id. 239 (Ala.); *Gaines v. Gaines*, 45 Id. 295 (Miss).

In no other subject of the law is found a greater diversity of legislation than that concerning the organization and powers of probate courts, or, as they are sometimes termed, orphans' and surrogates' courts; and it is very often an exceedingly important practical inquiry, How far has this probate system divested chancery of its former jurisdiction over the settlement of the estates of decedents, and other probate matters? In 3 Pomeroy's Eq. Jur., see. 1154, is found this language: "The states may be roughly grouped into three classes, although there is a considerable diversity among the individuals comprising each class. In the states of the first class, the original equitable jurisdiction over administrations remains unabridged by the statutes, concurrent with that possessed by the probate courts. In many of them, a suit for the administration, settlement, and distribution of an estate may be brought, as

a matter of course, in a court of equity in the first instance, instead of in the court of probate. In most, the general principle regulating the exercise of all concurrent jurisdiction prevails, that when either court has assumed jurisdiction of a particular case, the other tribunal will not ordinarily interfere. These states are Alabama, Illinois, Iowa, Kentucky, Maryland, Mississippi, New Jersey, North Carolina, Rhode Island, Tennessee (in certain special cases), Virginia, District of Columbia, and the United States courts. In the states of the second class, the jurisdiction of the probate courts over everything pertaining to the regular administration and settlement of decedents' estates is virtually exclusive. The equitable jurisdiction over the subject is neither concurrent nor auxiliary and corrective. It exists only in matters which lie outside of the regular course of administration and settlement, which are of purely equitable cognisance, and which do not come within the scope of the probate jurisdiction. These states are Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, Oregon, and Pennsylvania. In the states of the third class, the equitable jurisdiction is not concurrent, but is simply auxiliary or ancillary, and corrective. The probate court takes cognisance originally of all administrations, and has powers sufficient for all ordinary purposes. Equity interposes only in special or extraordinary cases, which have either been wholly omitted from the statutory grant of probate jurisdiction, or for which its methods and reliefs are imperfect and inadequate, or where its proceedings have miscarried, and require correction. This class includes Arkansas, California, Georgia, Kansas, Missouri, New York, Ohio, South Carolina, Tennessee, Texas, Vermont, and Wisconsin." See also 1 Pomeroy's Eq. Jur., secs. 346, 352.

JURISDICTION OF CHANCERY OVER SETTLEMENT OF ESTATES, ETC., NOW FAR DIVESTED BY CALIFORNIA PROBATE SYSTEM.—The probate system of California is very comprehensive, complete, and detailed, and it is interesting to note how far, if at all, such a system has been held to have divested chancery of its original jurisdiction over the administration of the estates of decedents and other kindred matters. Under former constitutions, the district courts were given original jurisdiction in all cases in equity, while it was provided that probate or county courts should have such powers as might be prescribed by statute; while under the present constitution, the probate jurisdiction is given to the superior court, which is a court of original general jurisdiction at law and in equity. From the earliest day, the supreme court of the state has proceeded, to a great extent, upon the principle that the general jurisdiction of courts of equity over these matters still exists, but at the same time some special cause for equitable interference must be shown before they will interfere.

The jurisdiction of probate courts to settle the accounts of executors and administrators has been shown in the note to *Green v. Creighton*, 48 Am. Dec. 746. In addition to what has been there stated, it may be said that although a settlement in the probate court is a final settlement, one who was not a party to it may treat it as a nullity, and proceed to invoke the equitable powers of the district court to compel the administrator to a full account: *Clarke v. Perry*, 5 Cal. 58; S. C., 63 Am. Dec. 82. And district courts have exclusive jurisdiction to settle the accounts of administrators of administrators or executors of executors, with the estates which the latter represented: *Bush v. Lindsey*, 44 Cal. 121; *Wetzel v. Fitch*, 52 Id. 638. So where an administrator dies, without rendering an account, jurisdiction to compel an accounting vests in the appropriate court of equity: *Chaquette v. Ortel*, 60 Id. 594; *In re Estate of Curtis*, 65 Id. 572.

In accordance with the principles laid down by the note to *Green v. Creighton*, 48 Am. Dec. 746, it is held that the settlement of the accounts of a guardian is vested exclusively in the probate court: *Allen v. Tiffany*, 53 Cal. 16; *Brodrib v. Brodrib*, 56 Id. 563; but see *Wilson v. Roach*, 4 Id. 362; but these cases recognize that it is possible for a court of equity, under certain circumstances, to open an account so settled. And where a guardian dies before making a settlement of his accounts, and long after his ward's majority, the settlement of the account can only be had in a court of equity: *In re Allger*, 65 Id. 228.

Over matters like those relating to the probate of wills and the granting of letters testamentary and of administration, the probate court has exclusive jurisdiction: *Castro v. Richardson*, 18 Cal. 478; *In re Will of Bowen*, 34 Id. 682, 689; but a district court, as a court of equity, has jurisdiction to construe a will after admission to probate: *Rosenberg v. Frank*, 58 Id. 387, 400. A probate court has also exclusive jurisdiction of the final distribution of the estates of decedents: *Auguisola v. Arnaz*, 51 Id. 435. So a district court has no jurisdiction over the allowance or apportionment of the commissions of executors and administrators: *Hope v. Jones*, 24 Id. 89; nor of an action which seeks to charge the estate with expenses of administration: *Gurnes v. Maloney*, 38 Id. 85. On the other hand, over matters distinctively equitable, like the enforcement of trusts, probate courts have no jurisdiction: *Hascroft v. Trudel*, 51 Id. 421; and see *Auguisola v. Arnaz*, Id. 435, 438; nor to foreclose mortgages: *Myers v. Farquharson*, 46 Id. 190; *Willis v. Farley*, 24 Id. 490; *Belloc v. Rogers*, 9 Id. 123; and a district court, having gained jurisdiction for the purpose of foreclosure, may decree and execute a sale of the mortgaged premises, notwithstanding it is provided that, in general, no sale of property belonging to the estate shall be valid unless made by order of the probate court: *Belloc v. Rogers*, *supra*. As to the necessity first to present the claim to the executor or administrator, see *Hentsch v. Porter*, 10 Id. 555; *Willis v. Farley*, *supra*. In *Treat v. De Celis*, 41 Id. 202, the question was left undecided whether a probate court had jurisdiction of a proceeding to specifically enforce the performance of a contract of sale of real estate. See *Grimes's Estate v. Norris*, 6 Id. 621, in this connection. In *Griggs v. Olark*, 23 Id. 427, it was held that the jurisdiction of probate courts over the estates of decedents did not divest the district courts of their general jurisdiction, as courts of equity, over actions for the settlement of the affairs of a partnership; and see *Theller v. Such*, 57 Id. 447.

A district court can, where fraud and collusion with an administrator are charged against a probate judge in entering an order or decree, review the same and annul it, if the facts justify such a conclusion: *Sanford v. Head*, 5 Cal. 297. So a superior court, in an equitable proceeding, may set aside a decree in a probate proceeding, when it appears that the decree was obtained by fraud, and without notice to the party against whom it was rendered: *Baker v. O'Riordan*, 65 Id. 368; see also *In re Estate of Hudson*, 63 Id. 454; *Dean v. Superior Court*, Id. 473.

WATERS v. MOSS.

[12 CALIFORNIA, 383.]

OWNER OF HORSE IS NOT GUILTY OF NEGLIGENCE in permitting it to run at large.

COMMON-LAW RULE REQUIRING OWNERS OF CATTLE TO KEEP THEM CONFINED within their own close does not prevail in California.

ACTION against Moss, trustee of the Sacramento Valley Railroad Company, to recover the value of a horse killed by the railroad. The facts are stated in the opinion.

Clark and Gass, for the appellant.

Latham and Sunderland, for the respondent.

By Court, TERRY, C. J. This is an action to recover the value of a horse killed by the cars upon the Sacramento railroad. The case was tried below without a jury; defendant had judgment, and the plaintiff appealed.

It appears that the horse had been permitted to run at large upon the uninclosed commons. That at the time the cars were passing, the horse, in company with others, was about crossing the railroad track upon a public road; becoming frightened, it ran along the track some hundred yards, where the road crossed an open culvert, there being a fence on each side of the track; that the horse failed in the attempt to leap this open culvert, and was run over and killed by the locomotive.

The court below refused to permit plaintiff to prove that it was the custom in this state to permit domestic animals to roam at large upon the uninclosed commons; but held that, in so permitting his horse to roam at large, the plaintiff was guilty of negligence, and that he was not entitled to recover damages for a loss which was in fact occasioned by such negligence.

This was error. The rule of common law which required owners of cattle to keep them confined to their own close has never prevailed in California. Before the discovery of the gold mines, this was exclusively a grazing country; its only wealth consisting in vast herds of cattle, which were pastured exclusively upon uninclosed lands. This custom continued to prevail after the acquisition of the country by the United States, and has been in various instances recognized by the legislature.

The common law was adopted only so far as it was not repugnant to the constitution and statutes of the state. Now, the rule contended for by respondent, and adopted by the

court below, is repugnant to no less than three statutes passed by the session of the legislature at which the common law was adopted, to wit, the law regulating *rodos*, the act concerning marks and brands, and the act concerning lawful fences.

If it were contemplated by the legislature that all such animals were to be confined to the close of the owner, where was the necessity of providing for a general herding of all the cattle of a neighborhood, after notice, in order that all might attend and each select his own? or of requiring cattle and horses to be branded before reaching a certain age? or the justice of providing that damages for loss of crops destroyed by cattle should only be recovered by those whose farms are inclosed by a certain description of fence?

Judgment reversed, and cause remanded.

BALDWIN, J., concurred.

COMMON-LAW RULE REQUIRING OWNER TO KEEP BEAST WITHIN HIS OWN CLOSE, where in force: See *Chicago etc. R. R. v. Patchin*, 61 Am. Dec. 65; *Kerohacker v. Cleveland etc. R. R.*, 62 Id. 246; *Vicksburg etc. R. R. v. Patten*, 66 Id. 552; *Myers v. Dodd*, 68 Id. 624; *Murray v. South Carolina R. R.*, 70 Id. 219, and notes collecting other decisions. The principal case has been cited to the point that this rule is not the law of California or Nevada: *Loyan v. Gedney*, 38 Cal. 581; *Chase v. Chase*, 15 Nev. 262; and see also *Union Pacific R'y v. Rollins*, 5 Kan. 187.

OWNER OF ANIMALS, WHETHER GUILTY OF NEGLIGENCE IN PERMITTING THEM TO RUN AT LARGE: See particularly *Chicago etc. R. R. v. Patchin*, 61 Am. Dec. 65; *Kerohacker v. Cleveland etc. R. R.*, 62 Id. 246; *Murray v. South Carolina R. R.*, 70 Id. 219, and notes the thereto.

FRALER v. SEARS UNION WATER CO.

[12 CALIFORNIA, 555.]

MISJOINDER OF CAUSES OF ACTION DOES NOT EXIST where the complaint asks damages for the immediate injury to a mining claim caused by the breaking of a dam, and for the consequent preventing the plaintiffs from working the claim.

OWNER OF DAM MUST SO GOVERN AND CONTROL IT that injury will not result to his neighbors.

WANT OF REASONABLE CARE BY PLAINTIFFS TO PREVENT INJURY IS NO DEFENSE to an action against the owners of a dam for damages caused by the negligent construction and use of the dam.

ACTION for damages. The facts are stated in the opinion.

Francis J. Dunn, for the appellants.

McConnell and Niles, for the respondents.

By Court, BALDWIN, J. This was an action for injuries to mining claims, and loss of gold-bearing earth, occasioned by the negligent building of defendants' dam across and over a ravine, upon which the plaintiffs' claims were located—the claims being above the dam. The injury is charged to have resulted to the plaintiffs from the careless construction of the dam and a reservoir, whereby the gold-bearing earth of the plaintiffs was washed away by the water and lost, and other injuries done to their mining claims and property.

The defendants demurred to the complaint, and assigned several technical causes of demurrer. The main ground taken here in argument is, that there is a misjoinder of causes of action in the complaint, in this: That the complaint claims damages for the immediate injury by the breaking of the dam, to the pay-dirt, etc., of the plaintiffs, and also to the plaintiffs in preventing them from working their claim. But this is no misjoinder—if the objection be warranted by the facts—even according to the rules of common-law pleading, which recognized the nice and now obsolete distinction between the action of trespass *vi et armis* and the action of trespass on the case. For either of these classes of damages, the form of remedy would be case by the old rule; the gist of the action not being the erection or breaking of the dam, but the negligence—the indirect consequences of which negligence was the injury—just as in cases of injuries caused by the not keeping of streets in repair, and the like: 1 Ch. Pl. 126.

The complaint seems to be well drawn, and sufficiently states the facts, viz., that the plaintiffs, before the committing the grievances complained of, owned and possessed the premises injured, and that the defendants carelessly, negligently, and unskillfully built the dam and reservoir, and filled it with great quantities of water, which they detained at and along the dam, thereby causing the plaintiffs' claims to overflow, and the gold-dirt to be washed away, and the claims to remain unworked, etc.

Numerous instructions were given, and several were refused. The court instructed the jury that the plaintiffs could not recover unless the defendants were guilty of gross negligence. This was repeated in a variety of forms. We think that if any fault is to be found with the charges given, it is that they were too favorable to the defendants.

An instruction, marked No. 4 of those asked by the defendants, was refused, and the refusal excepted to. The court was asked to charge that if the jury believe that the injuries could

have been prevented by the exercise of reasonable care on the part of the plaintiffs, they must find for the defendants. This was refused. If such an instruction be proper in any case, it is not in this. The plaintiffs were in no default for keeping their property on their own premises, nor were they bound to remove it, nor to rebuild or alter the defendants' dam. They could not be held to the knowledge of the consequences, or the probable injuries resulting from the defendants' negligence. The defendants were bound to see to their own property, and to so govern and control it that injury would not result to their neighbor's. If, in consequence of gross neglect on the part of the plaintiffs, the injury happened, a different rule might be applied; but a mere want of reasonable care to prevent the injury does not impair the right to recover. We apprehend, if a man carelessly fires a gun into the street, that it would scarcely be admissible for him, when sued for the injury done another by it, to say that, by reasonable care, the other might have got out of the way.

The instructions given in this general form, if the substance could be supported under any given state of facts, could only be to mislead the jury in this case; for what would be reasonable care under the circumstances? What should the plaintiffs have done? Should they have controlled the property of defendant? or removed his own effects? if so, when? or inspected the dam, or offered to repair it, or given formal notice of defects? These inquiries show the danger of such an instruction, as well as illustrate the radical error it embodies: See *Lynch v. Nurdin*, 1 Ad. & El. 29.

Several other instructions were asked, but the substance of them had already been given; and the body of the charges, some twelve or more, presented to the jury fully and clearly the propositions of law which applied to the whole case, and every material point, and enabled the jury fairly to pass upon the entire issue.

We cannot interfere with their verdict, there being some evidence upon which it can rest.

Some other errors were assigned, but we think it unnecessary to notice them.

The judgment is affirmed.

TERRY, C. J., concurred.

LIABILITIES OF OWNERS OF DAMS FOR INJURIES: See *McCoy v. Danley*, 57 Am. Dec. 680, and note, where the question is discussed; also *Cowles v. Kidder*, Id. 287. The principal case, it will be seen, holds them to a very strict accountability.

HOUSTON v. WILLIAMS.

[13 CALIFORNIA, 24.]

LEGISLATURE CANNOT REQUIRE SUPREME COURT TO STATE REASONS FOR ITS DECISIONS IN WRITING, the constitutional duty of the court being discharged by the rendition of its decisions.

IT IS DISCRETIONARY WITH COURT WHETHER IT WILL GIVE OPINION ON PRONOUNCING JUDGMENT, and if given, whether it will be oral or in writing.

JUDGES OF COURT MAY CONTROL ITS RECORDS so far as essential to the proper administration of justice, and this control is beyond the reach of legislation.

DECISION OF COURT CONSTITUTES ITS JUDGMENT, while the opinion represents merely the reasons for that judgment.

DECISION OF SUPREME COURT IN CALIFORNIA IS ENTERED OF RECORD IMMEDIATELY on its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing or a modification. But the opinion of the court is the property of the judges, subject to their revision, correction, and modification in any particular deemed advisable until, with the approbation of the writer, it is transcribed on the records, when it ceases to be subject to change, except through regular proceedings before the court therefor, by petition.

CLERK OF COURT, THOUGH CONSTITUTIONAL OFFICER, IS SUBJECT TO ORDERS OF COURT in regard to the control of its records.

EJECTMENT. The defendant recovered judgment in the lower court. On appeal, this judgment was reversed by the supreme court from the bench. No opinion in writing was filed, but the reasons of the court for the decision were stated orally. Plaintiff's counsel presented a petition asking the court to file a written opinion.

William T. Wallace, for the petitioner.

Spencer and Rhodes, for the respondent.

By Court, FIELD, J. At the present term, the judgment in this case was reversed without any opinion being given setting forth the reasons for the reversal. The appellant now moves the court to file an opinion, and cites section 69 of the statute of May 15, 1854, amending the practice act, which provides that "all decisions given upon an appeal in any appellate court of this state shall be given in writing, with the reason therefor, and filed with the clerk of the court," except in cases tried in the county court, on appeal from a justice's court.

The provision of the statute had not been overlooked when the decision was rendered. It is but one of many provisions embodied in different statutes by which control over the judiciary department of the government has been attempted by

legislation. To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the legislature to prescribe the mode and manner in which the judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension; but where is the limit to this power if its exercise in any particular be admitted?

The truth is, no such power can exist in the legislative department or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The legislature can no more require this court to state the reasons of its decisions than this court can require, for the validity of the statutes, that the legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases in which opinions were never delivered. The facts are stated by the reporter, with the points arising thereon, and are followed by the judgments rendered; and yet no one ever doubted that the courts, in the instances mentioned, were discharging their entire constitutional obligations: See, by way of illustration, cases in 1 Conn., in 1 Brock. Va. Cas., and in 4 Har. & M.

The practice of giving the reasons in writing for judgments has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the judges and taken down by the reporters in short-hand: 1 Bla. Com. 71.

In the judicial records of the king's courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *elephantini libri*, of infinite length, and,

in mine opinion, lose somewhat of their present authority and reverence; and this is also worthy for learned and grave men to imitate:" Co., pt. 3, pref. 5.

The opinions of the judges, setting forth their reasons for their judgments, are of course of great importance in the information they impart as to the principles of law which govern the court and should guide litigants; and right-minded judges, in important cases—when the pressure of other business will permit—will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries.

The court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion, the authority of the court is absolute. The legislative department is incompetent to touch it.

With the expression of these views, we might close this opinion by denying the motion; but it will not be impertinent to the matter under consideration to say a few words as to the control of the court over its opinions and records. There are some misapprehensions on the subject, arising chiefly from a confusion of terms, and from a misconception of the relation of the different departments of government to each other, and the entire independence in its line of duties of the judiciary. The terms "opinions" and "decisions" are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion has been sometimes regarded as a mutilation of a record. A decision of the court is its judgment; the opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing, or a modification; the latter is the property of the judges, subject to their revision, correction, and modification, in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records. In the haste of composition, some errors will occur; in the copying, several; in the printing, many. There will also be, at times, expressions of opinion on incidental questions, too strong and unqualified. All these errors, whether in language,

form, or substance, should be corrected before a publication is permitted, as an authoritative exposition of the law, and, as such, binding upon the court. The power of enforcing a correct publication, when the publication is authorized, cannot reasonably be denied. In no civilized state except in California has the existence of this power ever been doubted. Every judge, from the chief justice of the supreme court of the United States down, claim and exercise, without question, the right of revision, including thereby modification and partial suppression of his opinions. In the recent case in relation to the Sutter grant, we are informed that application was made for a copy of the opinion delivered, and that the application was refused, on the ground that Mr. Justice Campbell, who delivered it, wished to revise it before it left the clerk's office. When the opinions have been revised and finally approved and recorded, then they cease to be the subject of change. They then become like judgment records, and are beyond the interference of the judges, except through regular proceedings before the court by petition.

The records of the courts are necessarily subject to the control of the judges, so far as may be essential to the proper administration of justice. The court hears arguments upon its records; it decides upon its records; it acts by its records; its openings and sessions and adjournments can be proved only by its records; its judgments can only be evidenced by its records—in a word, without its records it has no vitality. Legislation which could take from its control its records would leave it impotent for good, and the just object of ridicule and contempt. The clerk, it is true, is a constitutional officer—not subject to appointment or removal by the court—but subject, in the control of the records, to its orders. It is true, the court cannot, without great abuse of its powers, take, directly or indirectly, from the clerk the perquisites of his office for copies of opinions and papers on file, nor authorize the destruction or mutilation of any of the records, but, subject to these limitations, it must necessarily exercise control, that justice may be done to litigants before it.

The power over our opinions and the records of our court we shall exercise at all times while we have the honor to sit on the bench, against all encroachments from any source, but in a manner, we trust, befitting the highest tribunal in the state. We cannot possibly have any interest in the opinions except that they shall embody the results of our most mature delibera-

tion, and be presented to the public in an authentic form, after they have been subjected to the most careful revision.

Motion denied.

TERRY, C. J., concurred.

LEGISLATIVE AND JUDICIAL DEPARTMENTS OF GOVERNMENT ARE INDEPENDENT within the limits assigned to each: See *Hawkins v. Governor*, 33 Am. Dec. 346; *De Chastellux v. Fairchild*, 53 Id. 570; *Wright v. Wright*, 56 Id. 723.

THE PRINCIPAL CASE IS CITED in *In re Stewart and Newton*, 13 Nat. Bank. Reg. 295, as an authority showing how far the legislative department of a government can impair or dictate the manner in which the powers of the judicial department shall be exercised.

HORN v. VOLCANO WATER COMPANY.

[13 CALIFORNIA, 62.]

ANSWER CONSISTING OF GENERAL DENIALS WITHOUT VERIFICATION ADMITS GENUINENESS and due execution of a note sued on, where a copy of such note is attached to and made part of the complaint.

IN ACTION ON NOTE AND MORTGAGE, INTERVENING CREDITORS of the defendant, who allege the note and mortgage to be fraudulent as against them, cannot therefor prevent a judgment for plaintiff against defendant, but are entitled merely to protection against the enforcement of the judgment to their prejudice.

TO ENTITLE PERSON TO INTERVENE IN SUIT, HE MUST HAVE INTEREST IN MATTER IN LITIGATION, of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. His interest must be one created by a claim to the demand, or some part thereof in suit, or by a claim to or lien upon the property, or some part thereof, which is the subject of litigation.

SIMPLE CONTRACT CREDITOR OF COMMON DEBTOR CANNOT INTERVENE in a foreclosure suit against debtor.

JUDGMENT CREDITORS HAVING LIEN MAY INTERVENE IN FORECLOSURE SUIT AGAINST DEBTOR as subsequent incumbrancers.

JUDGMENT CREDITORS HAVING LIENS ON MORTGAGED PREMISES are necessary parties to a complete adjustment of all interests in such premises, and the court may order them to be made parties on petition of intervention, or by amendment of the complaint.

SUBSEQUENT CREDITORS CANNOT COMPLAIN THAT DEBTOR'S NOTE AND MORTGAGE WERE EXECUTED WITHOUT CONSIDERATION.

VOLUNTARY CONVEYANCE IS NOT VOID AS AGAINST SUBSEQUENT CREDITORS unless fraudulent in fact—that is, made with a view to future debts—but evidence of an intent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors.

ACTION on note and mortgage against the Volcano Water Company. The company filed an answer of general denial.

priorities of the several liens. Looking, then, to the petition of these judgment creditors, and treating it as an answer to the complaint, and the parties as asserting a priority in the liens of their several judgments over the lien of mortgage, we find its allegations insufficient, if established, to justify a decree postponing the mortgage to the judgments. These judgments were all rendered long after the execution of the note and mortgage—with one exception, more than a year afterwards. It is not averred that these intervenors were creditors of the company when the note and mortgage were executed, or that the company was then indebted to any other person, or that the note and mortgage were given with intent to defraud subsequent creditors. It only avers that they were not executed by the trustees by any authority from the company, or to pay or secure any of its debts, or for any consideration received by it; but were given to pay, or to secure the payment of, a debt of certain stockholders of the company, contracted to meet the assessments levied upon their shares. If these averments were true, the subsequent creditors are not in a position to complain. It rests only with the company to question the authority of the trustees, or the validity of the note and mortgage for want of sufficient consideration. Subsequent creditors have nothing to do with them. The statute of 13 Eliz., c. 5, is the foundation of the acts on the subject of conveyances to hinder, delay, or defraud creditors in the several states, and has been substantially incorporated into our law: Act concerning fraudulent conveyances and contracts, sec. 20. This statute, says Hovenden, “declares all gifts, conveyances, and alienations of real or personal estate, whereby creditors may be delayed or defrauded, void as against such creditors; but judicial interpretation has determined that creditors at the time of the transaction are alone intended by the statute. Thus a settlement made after marriage, and therefore considered voluntary, will be maintained against subsequent creditors, provided the settler was not indebted at the time he made it. This general rule must, however, be qualified so as to exclude cases of positive fraud. It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement to make it fraudulent; if he do so with a view to his being indebted at a future time, it is equally a fraud, and ought to be set aside.” 2 Hovenden, 74.

As against subsequent creditors, then, a conveyance, even if voluntary, is not void, unless fraudulent in fact; that is, unless made with the view to future debts, though evidence of an in-

tent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors: *Sexton v. Wheaton*, 8 Wheat. 229; *Bennett v. Bedford Bank*, 11 Mass. 421; *Benton v. Jones*, 8 Conn. 186; *Carlisle v. Rich*, 8 N. H. 44; *Miller v. Thompson*, 3 Port. (Ala.) 196; *Bogard v. Gardley*, 4 Smed. & M. 302; *Wadsworth v. Havens*, 3 Wend. 411; *Elliott v. Horn*, 10 Ala. 348 [44 Am. Dec. 488]; *Edwards v. Coleman*, 2 Bibb, 204; *Smith v. Lowell*, 6 N. H. 67; *Parkman v. Welch*, 19 Pick. 231.

The only statement in the petition of the creditors in reference to any indebtedness of the company is that before the execution of the note and mortgage, the company had become indebted to a much greater amount than the amount of the capital stock paid in. This statement may be strictly true, and yet the fact exist that the company was not at the time indebted in any amount whatever. The indebtedness may have been contracted, and have been entirely canceled, or the company may have been in possession of property greatly exceeding its existing obligations, and with which such obligations were afterwards entirely satisfied.

The views which we have expressed dispose of the case upon the pleadings and petitions of intervention, and render it unnecessary to pass in review the questions raised upon the testimony. The judgment must be reversed, and the court below directed to enter a judgment against the company for the amount due on the note described in the complaint, and to decree a sale of the mortgaged premises, and the application of the proceeds of the sale: 1. To the payment of such judgment and the amount due the other defendants, such payment to be made to the parties *pro rata*; and 2. To the payment of the several judgments of the intervenors, Shaffer and others, in the order in which they became liens upon the mortgaged premises; and to dismiss the petition of the intervenor Rawle.

Ordered accordingly.

TERRY, C. J., and BALDWIN, J., concurred.

INTERVENTION, RIGHT OF: See *Chandler v. Fulton*, 20 Am. Dec. 188, and cases collected in note 200. In *Speyer v. Ihmels*, 21 Cal. 287, the principal case is cited as an authority showing when an intervention may take place. To authorize a person to intervene, his interest in a suit must be one created by a claim to the demand, or some part thereof, in suit, or by a claim to or lien upon the property, or some part thereof, which is the subject of the litigation: *Stitch v. Goldner*, 38 Id. 611, citing the principal case. Parties having an equitable right, concerning which they will be bound by the direct and

legal operation of a judgment, may properly intervene: *Gradwohl v. Harris*, 29 Id. 154; *Smith v. Ford*, 48 Wis. 151, citing the principal case.

CONVEYANCES, WHEN FRAUDULENT AS AGAINST SUBSEQUENT CREDITORS: See *Huggins v. Perrine*, 67 Am. Dec. 131, and note 133; *Ladd v. Wiggin*, 69 Id. 551, and note 559.

GOODWIN v. HAMMOND.

[13 CALIFORNIA, 163.]

ANSWER RESPONSIVE TO BILL IN EQUITY, AND DENYING CHARGES THEREIN, is not evidence for the defendant, though the bill be sustained by one witness only.

CALIFORNIA PRACTICE ACT GOVERNS ALL CASES, LEGAL AND EQUITABLE, by the same rules, at least in regard to evidence necessary to sustain the pleadings.

INSTRUMENT FRAUDULENT AB INITIO IS VOID for all purposes of protection to the fraudulent actor.

BILL to set aside fraudulent transfers of stock. The opinion states the facts.

Yale, for the appellant.

Harman and Labatt, for the respondent.

By Court, BALDWIN, J. Bill to set aside as fraudulent two transfers of stock of the California Coal Company, from the defendants Chittle and Wardner, to defendant Hammond.

The court below, on express evidence of the existence of the fraud, found for the plaintiff.

Several points are made by the appellant:

1. That this proof was made by one witness only, and this in contradiction to the defendant's answer, which was responsive to and negatived the charge in the bill; and that, by the rule of equity pleading, this is not sufficient.

The point is not well taken. We have held recently in several cases that the practice act governs all cases of pleading, legal and equitable, by the same rules, at least in this respect; and that the answer is not evidence for the defendant.

2. That the decree is against evidence. We have looked into the proof and think it sustains the decree; at least, that the judge below had legal evidence before him of the alleged fraud, and we do not see any such error as would justify our interference with his conclusion.

3. That the decree is erroneous in setting aside the transfer *in toto*, and not allowing the alleged fraudulent vendee to hold

the stock as security to reimburse him for the amounts expended by him in purchase-money and assessments.

In some cases of mere constructive frauds, this principle is held by courts of equity; and in some instances of actual fraud, the like doctrine has been maintained. But these last are rare exceptions to the general rule. Where the fraud is actual, and characterizes the transaction *ab initio*, we think the better rule is, that the deed is void for any purpose of protection to the fraudulent actor: See *Borland v. Walker*, 7 Ala. 280; *Sands v. Codriss*, 4 Johns. 536 [4 Am. Dec. 305], where the authorities are collected.

The decree is affirmed.

FERRY, C. J., concurred.

ANSWER TO BILL IN EQUITY, EFFECT AS EVIDENCE: See *Carleton v. Vason*, 54 Am. Dec. 492; *Buck v. Sweeney*, 56 Id. 681, and notes to both cases.

THE PRINCIPAL CASE IS CITED in *Swinford v. Rogers*, 23 Cal. 236, to the point that an instrument fraudulent *ab initio* is void for all purposes of protection to the fraudulent actor; and in deciding the case, the court say that a conveyance tainted with fraud will not be allowed to stand even as security for advances actually made.

BENSLEY v. MOUNTAIN LAKE WATER COMPANY.

[18 CALIFORNIA, 303.]

OWNER OF LAND IN POSSESSION IS ENTITLED TO INJUNCTION to prevent insolvent defendants from entering upon such land, and by means of excavations, embankments, and diversion of valuable streams, committing irreparable injury, and despoiling the land of the substance of the inheritance, besides creating a cloud upon the plaintiff's title.

PRIVATE PROPERTY CANNOT BE TAKEN FOR PUBLIC USE without first paying or securing to the owner just compensation therefor, as a condition precedent to title or the right of possession by the public or its agent.

PARTY PROCURING ORDER FOR CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USE cannot, without complying at all with the requirements of the proceeding, which are of service to the owner, lay by for four years, and then without notice give effect to the previous and initiary acts through which he derails his title.

ONE RELYING FOR TITLE TO PROPERTY ON EXTRAORDINARY MODE OF ACQUISITION GIVEN HIM BY LAW, and against the will of the owner, must show strict compliance with the statutory rules from which his title accrues.

ON CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USE, compensation must be made within a short period, or the privilege of taking the property under the condemnation will be deemed abandoned.

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BOHA FIDE PURCHASER OF LAND IS NOT AFFECTED BY PROCEEDINGS FOR ITS CONDEMNATION TO PUBLIC USE, pending at the time of purchase, if he had no notice of such proceedings, and no notice of *his pendens* had been filed.

APPEAL from the district court of the fourth judicial district, county of San Francisco. The facts are fully stated in the opinion.

Thomas C. Hambly, Elisha Cook, and McDougal and Sharp, for the appellant.

Shafters, Park, and Heydenfeldt, for the respondents.

By Court, BALDWIN, J. The plaintiffs below, respondents here, filed this bill, averring that they are the owners of certain lands lying in San Francisco county, and situate at the mouth of Lobos creek; that their title comes from one Emerson, who originally held the same, and that the plaintiffs have jointly possessed these lands since the sixteenth day of May, 1854; that the defendants, on the twenty-ninth day of June, 1857, obtained an order or judgment in the fourth district court for the condemnation of these lands for the use of defendants. It is alleged that this judgment of condemnation is void, or should be so declared. The plaintiffs say that this judgment was irregular, and they assign the particular grounds which, they say, avoid it. They aver that the proceedings were dismissed before this final order thus assailed was made; that they were voluntarily abandoned before this time; and the bill charges that the company threaten to enter under the order, and that they will, unless prevented, proceed to make excavations, embankments, and structures on the land, and divert valuable springs and streams thereon; and that the company and Scannell, the sheriff, acting under the order, are insolvent. An injunction was granted according to the prayer of the bill. The plaintiffs claim to be in possession, and they assert, as the natural consequences of the act they seek to enjoin, besides that a cloud upon their title is created, irreparable injury by insolvent persons entering upon their property and despoiling it of the substance of the inheritance. They say that this is an irreparable damage, and that the remedial principle of equity jurisprudence, which makes this a matter of chancery jurisdiction, applies in full force to such a case. If this state of facts be maintained, there seems to be no doubt in reason and on authority of the propriety of the equitable interference: See *Stone v. Commercial R. R. Co.*, 4 Myl. & Cr. 122; *Agar v.*

Regents' Canal Co., Coop. temp. Eldon, 77; *Bonaparte v. Camden and Amboy R. R. Co.*, 1 Baldw. 232.

It is necessary, to a proper understanding of the questions involved in this issue, to consider the facts shown by the record. That the title to this property was in Emerson is conceded; for the defendants claim to have a right of entry by virtue of proceedings condemning it as his. The only question, then, is, whether they have so proceeded as to subject it legally to their use or dominion. It is not necessary to question the right of the state government, by virtue of its eminent domain, to take private property for public use in an authorized manner, nor, as a corollary or consequence of this general governmental power, to authorize its agents, whether corporate bodies or individual, to exercise this high sovereign prerogative. But it is just as indisputable that this right can only be exercised in pursuance of law, and in conformity to the constitution. A citizen is entitled to hold his property free of any interference, except through the taxing power from the government, or his fellow, subject to this one qualification: that when it is necessary for the purposes of the public, it may be taken from him, provided the government so taking, or authorizing others to take it, shall make the owner just compensation; which must be paid or secured to him before he is deprived of his possession. This has been decided in many cases, and recently by this court in the case of *McCauley v. Weller*, 12 Cal. 500.

The defendant, in this case, is a corporation organized under the act of April 22, 1850, for the purpose of introducing fresh water into the city of San Francisco from the Mountain lake, situated in the vicinity of the city. One Merrifield was authorized by a city ordinance to introduce the waters of the lake into the city for the period of twenty-five years ensuing the first day of January, 1853, and by that day the work was to be done. Afterwards Merrifield assigned his rights to this company. The city authorities extended the period for the completion of this work from time to time, until September, 1857. After this time, it is charged in the bill, and not denied, that the work not having been completed, the board of supervisors passed a resolution declaring the privileges at an end.

On the fifteenth of June, 1853, the company filed a petition in the fourth district court to condemn the lands in question. Commissioners were appointed June 24, 1853, who reported

August 23, 1853, as to the value of the lands—among others, that the land of Emerson was worth, with crops, etc., three thousand dollars.

On December 25, 1856, the company, without notice to the plaintiffs, procured an order confirming the report of 1853. On the twenty-ninth of June, 1857, without notice to plaintiffs, the company procured a final order or judgment condemning the lands, and directing that defendants should be let in possession on payment of the three thousand dollars. Emerson was once the owner and in possession of a part of the lands sought to be condemned—this being that in dispute here. Perkins and Bensley, claiming through Emerson, have possessed the land jointly since October, 1853.

Before this final judgment of confirmation, viz., on the seventeenth of December, 1853, an order was entered on the minutes of the fourth district court, reciting that it appeared to the court that said company did not intend further to proceed to obtain possession of the lands named in their petition, and dismissing the action; and it is charged in the bill, and not denied, that on the same day the company withdrew the deposits of money theretofore made with the clerk of the court for the payment of the assessed damages, and also the collaterals deposited with the clerk by the company for the securing of the damages.

Some question is made as to the authority by which this order was made, and also, whether it were made in or for this proceeding; but we regard these questions as not very important. It is very certain that the money paid into court as damages for the land comprehended these three thousand dollars assessed by the commissioners for Emerson's land. It is just as certain that this money was received by the executive officer, or with the approbation of this officer of the company, and with knowledge of the source and authority of the repayment. Nearly four years passed without any action to restore the money, or further steps being taken to give effect to the appropriation of this property, or to perfect the title. The question then is, whether a party knowing of an order purporting to show an abandonment of proceedings for the condemnation of property, and giving effect to it by receiving benefits and advantages accruing through such order, can, after the lapse of several years, be heard to allege that such an order was unauthorized, and the fact it recites untrue. But to steer clear of any disputed facts, the broader question may be made, whether the party, after procuring an order for the condemnation of property to public use, can lay by for four years without complying at all with those

requirements of the proceeding which are of service to the owner, and then without notice give effect to the previous and initiatory acts through which he deraigns his title. This statutory power of taking property from the owner without his consent is one of the most delicate exercises of governmental authority. It is to be watched and guarded with jealous scrutiny. Important as the power may be to the government, the inviolable sanctity which all free constitutions attach to the rights of property of the citizens constrains the strict observance of the substantial provisions of law, which are prescribed as modes of the exercise of the power, and to protect it from abuse. All statutory modes of divesting titles are strictly construed, and to be strictly followed. He who relies for a title upon an extraordinary mode of acquisition given him, not by the will of the owner, expressed or implied, but against his will and by the mandate of the law, must show for his warrant a strict compliance with those statutory rules from which his title accrues. Accordingly, all tax laws are construed rigidly, and must be closely followed, in order to divest or vest title. It would be strange if a petty charge could not be laid upon property for its protection and the support of government, without strictly following the laws imposing the tax, and yet the whole property be taken by the law in fee and forever, without this same strict observance of legal rules. No court has gone further than this in the doctrines asserted upon this subject, giving this salutary protection to private rights: *McCauley v. Weller*, 12 Cal. 500.

It is a mistake to suppose that any title comes from mere appropriation of another's property, or from the taking of the legal proceeding to condemn it. The constitution is express. Private property shall not be taken for public use without compensation. The compensation precedes the title. The compensation must be adequate; but adequate when? Of course, when the property is so taken. The right to take on the terms adjudicated—which is a compulsory statutory sale—accrues from the legal proceedings, the petition, the report, the confirmation; then the price becomes fixed. But no right of entry—much less a title—accrues so far. The party condemning, the representative of a state is then in a condition to be a purchaser; the other party is in a situation of a vendor making an agreement of sale on condition precedent, but retaining his title and possession until payment. The property is rated according to its cash value; the money is expected to be paid at once, or within a short period. It cannot be pretended that a party

thus trading with another, without this latter's consent, can also fix the terms of the payment any more as to time of payment than as to price. If this were so, all an insolvent company having this right need do would be to condemn property prospectively valuable, and wait for years until the property quadrupled its value, and then claim it under its first valuation. Even in respect to executory agreements, we held in *Green v. Covillaud*, 10 Cal. 317 [70 Am. Dec. 725], as had been held before, that the party seeking an enforcement of a contract of sale of real estate must be prompt in the compliance with his obligations, and that a delay of payment—in that case of twenty-two months—unexplained, was fatal to his right to enforce the contract. The rule in such a case as that cannot be more strict than in this.

If we were to hold that by force of these proceedings, in 1853, this company had a right to wait until 1857, and then insist upon giving them effect, we must necessarily hold that the property condemned need not be paid for according to its valuation or real value in 1857, the time when really taken, but may, in effect, be paid for according to its assessed value in 1853, when proceedings were first instituted, and be paid for, not in cash, but on four years' credit, without security. Nay, more: that it might be taken at the mere option of the company, without any sort of obligation on their part to take it if they chose to decline, as possibly they might if it deteriorated in value. It would be a unilateral contract, binding one party, but not binding the other; and, translated into plain English, would mean: "If we [the company] choose, we will take your [Emerson's] land four years hence, by paying for it what is now assessed as its value. You are to keep it for us, and not sell it, for all that time; but if it declines in value, or we do not choose to take it, we will not do so." No sane man, if left to his volition, would make such a trade, and we think we have shown that the law is not so unjust or arbitrary as to make such a bargain for a citizen when it subjects him to its power.

The report and assessment of the commissioners are only effectual to fix a price for the property, for the purpose of enabling the company to take it at that price at the time of or within a short period after the assessment and the confirmation of the report. To entitle the company to take the property on those terms, they must avail themselves of the privilege within the proper time. The lapse of a reasonable time without availing themselves of the privilege was itself an abandon-

ment of all claim to it. To say the very least, when a year had passed and no offer made, the proceedings were effectually discontinued. The assessment had become *functus officio*; just as if an offer had been made to the company by Emerson to take the property at a price agreed on, and no answer had been made by the company for that period. The company had no right in 1857 to revive the old initiatory proceedings of 1853, and claim to give effect to the attempted condemnation of the latter year. The payment of the money to the clerk, and its subsequent withdrawal, left things where they were before the payment. A payment which by the act of the party is ineffectual is in law no payment at all.

The argument which opposes these views is, that by the mere fact of condemnation, a right of entry and possession accrued to this company without any payment or provision of payment, and several authorities from other states are cited to sustain this proposition. Perhaps it is a sufficient answer to state that, by the very terms of the order of 1857, possession was not to be taken except upon or until after payment. The authorities cited rest upon peculiar statutes or constitutional provisions of the states in which the cases were decided. There is nothing in the legislation of this state which gives any right of possession until the compensation is made, nor, if we may indicate our ideas of policy, should there be in any state. To all just ideas of individual rights, there can be no doctrine more abhorrent than the notion that any free government had delegated to a private corporation a right to go upon the lands of a citizen and dispossess him of his freehold, and coolly inform him that after a while it will remunerate him for his property when it finds it convenient to pay him; but in the mean time he must content himself with being disseised, and rely upon the faith and ability of the disseisor to make him reparation: See *Bloodgood v. Mohawk etc. R. R. Co.*, 18 Wend. 9 [31 Am. Dec. 313]; *Thompson v. Grand Gulf etc. R. R. Co.*, 3 How. (Miss.) 240 [34 Am. Dec. 81].

2. It is said, too, that the company denies that Emerson has any title. If this be so, why was he made a party? and why are not only himself but his successors in interest sought to be affected by these proceedings? Why, at this late day, is the amount of damages assessed in 1853 offered to be paid to him or them? But is not possession in 1853 by Emerson, and subsequent deeds to and possession under them by his vendees, evidence of title as against those pretending to none, except through these proceedings against him?

We have held, upon the soundest authority, that the compensation must be first tendered or paid, or at least satisfactorily provided, before any right to the property can be acquired, or any right of possession destroyed. And if isolated instances of departure from these conservative principles could be found, we should certainly regard them rather as warnings than as examples. But we feel confident that no well-considered case can be cited which holds that, under a statute similar to our own, a corporation may take possession of a man's property, and put him off with a mere promise or undertaking that it will afterwards pay him for it. The authorities are all collected in the excellent work of Mr. Smith on constitutional and statutory construction, pp. 476 et seq., and the conclusion of the author is as we have given it.

3. Equally fatal is the other point—that the property had changed hands since the commencement of these proceedings; and that, so far as appears, these plaintiffs were purchasers without notice of any claim to the land on the part of the defendant, who had filed no *lis pendens*, and had by its conduct induced the idea that it had abandoned this attempted condemnation of the land. A notice of the dismissal of the proceedings certainly was no notice of the existence of the claim.

Decree affirmed.

TERRY, C. J., concurred.

On petition for rehearing, the following opinion was delivered:

BALDWIN, J. The petition for a rehearing reviews several portions of the opinion which constitute but little, if any, part of the controlling reasons of the conclusion. We attached no importance to the action of the board of supervisors, though their action was stated as one of the facts in the case.

We supposed that, as the commissioners assessed to Emerson three thousand dollars for land in his possession and injury to the crops, and these three thousand dollars were alleged to have been paid into court, we might assume that the title was recognized to be in the tenant in possession, to or for whom compensation for the land was proposed to be made by the defendant.

When we spoke of notice to the plaintiffs, we spoke of legal notice, not of loose conversation on the street or elsewhere. If any notice is required to give effect to judicial proceedings, it is notice in that authentic shape which binds parties to the result of a judicial inquiry.

We supposed, too, when a man deposits so large a sum as

three thousand dollars in court, that he is, of course, to be considered as aware of the fact that he has deposited it, and if it be withdrawn by order of court, that he knows of the withdrawal; and that it must be presumed, if nothing more is heard of the money for four years, when he makes another tender of the same sum, that he had received back the money first deposited; and especially if he does not deny a specific allegation that he did withdraw it, that this presumption is conclusive.

The main principle upon which we went in the opinion is this: that after proceedings for a condemnation, which proceedings result in an assessment of damages, the money must, within a reasonable time, be paid or deposited; and if four years intervene before such an act is done, the proceedings must be held to be discontinued; and that a deposit does not mean merely formally putting the money into court and then withdrawing it.

That a party is not bound to wait after a deposit and withdrawal of the money for years to see whether the party seeking to condemn it intends completing the process by which alone he can get title. This proposition is wholly independent of the question whether the value of the property rises or falls in the mean time; though, if it be stationary, the difference is the difference between money and four years' credit, and the difference between an immediate forced sale on the terms the law annexes and a sale to take place at the convenience of the person condemning the land.

We did not overlook the point that the injunction order restored the plaintiff to the possession.

This was irregular. But the case was tried on the merits, and the plaintiff, then, according to our view of the case, would have been entitled to an order of restitution of a possession improperly taken under color of these illegal proceedings.

This being so, the court of equity only erred as to the time of making this order; the whole record being before us in a chancery case, we would not reverse for an error which does no legal damage, merely because the court did at first irregularly what at last it would have been bound to do.

Rehearing denied.

TERRY, C. J., concurred.

INJUNCTION TO PREVENT THREATENED TRESPASS WHERE DEFENDANT IS INSOLVENT: See *Gause v. Perkins*, 69 Am. Dec. 728, and note 733.

EMINENT DOMAIN, COMPENSATION CONDITION PRECEDENT TO TAKING: See *Moale v. Mayor etc. of Baltimore*, 61 Am. Dec. 276; *Henderson etc. R. R. Co.*

v. *Dickerson*, 66 Id. 148, and note 153; *Brown v. Beatty*, 69 Id. 389, and note 396. The principal case is cited in *Johnson v. Alameda Co.*, 14 Cal. 107, *Curran v. Shattuck*, 24 Id. 435, and *San Francisco etc. R. R. Co. v. Mahoney*, 29 Id. 117, to the point that compensation must precede the taking. In *Edwards v. Wyandotte*, 2 Dill. 382, the principal case is cited as an authority on the subject of eminent domain.

STATUTES PROVIDING FOR TAKING PRIVATE PROPERTY FOR PUBLIC USE must be strictly complied with: See *Nichols v. Bridgeport*, 60 Am. Dec. 637, and cases in note 649. Such statutes are in derogation of the common law, and these and any other statutes divesting title against the owner's will must receive a strict construction and be fully complied with: *Gilmer v. Lime Point*, 19 Cal. 60; *Curran v. Shattuck*, 24 Id. 432; *Stanford v. Worn*, 27 Id. 174; *Smith v. Davis*, 30 Id. 537; *Trumpler v. Bemertly*, 39 Id. 491; *New Orleans etc. R. R. Co. v. Frederic*, 46 Miss. 11, all citing the principal case.

IN ABSENCE OF ACTUAL NOTICE OR LIS PENDENS IN CALIFORNIA, a party has no notice of a pending action: *Sampson v. Ohleyer*, 22 Cal. 210, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Fox v. Western Pac. R. R. Co.*, 31 Cal. 547, where the court say that though the constitutionality of the statute of California providing for condemnation of private property for public use may have arisen incidentally in the principal case, no direct decision on that question was given.

WHITNEY v. BUTTERFIELD.

[18 CALIFORNIA, 335.]

SHERIFF IS BOUND TO USE REASONABLE DILIGENCE ONLY, in the execution of process; what constitutes such diligence depends upon the particular facts, whether, for instance, the writ be for fraud, or because the defendant is about to leave the state, or remove his property, and the like.

WRIT PLACED IN SHERIFF'S HANDS ON SUNDAY IS NOT CONSIDERED OFFICIALLY RECEIVED by him on that day, nor is it officially in his hands until Sunday has expired.

WHERE SHERIFF RECEIVES ONE WRIT OF ATTACHMENT ON SUNDAY, and another against the same defendant is placed in the hands of a deputy at a quarter-past twelve on Monday morning, and without the sheriff's knowledge, and the first levy is made under the last writ at one o'clock on Monday morning, the sheriff is not guilty of negligence in executing the first writ, where no other special circumstances are shown why more diligence should have been used in executing the writ.

SHERIFF AND HIS DEPUTY ARE ONE PERSON IN LAW, so far as to make the former responsible for the acts of the latter, but not so far as to require impossibilities of the sheriff, or to impose unconscionable exactions. And the mere omission of a deputy to inform the sheriff that he has process in his hands is not such negligence as to charge the sheriff in case a writ last in hand was executed first.

ACTION by Whitney against a sheriff and his sureties for not levying an attachment with due diligence. Whitney's writ of

attachment was placed in the hands of the sheriff on Sunday, between nine and ten o'clock P. M. About fifteen minutes after twelve o'clock A. M. on the next day, Monday, Clark & Co. put a writ of attachment against the same party defendant, as in Whitney's suit, into the hands of one of the sheriff's deputies, which writ was levied about one o'clock on said Monday morning. Plaintiff's attachment was levied about eight o'clock in the morning of the same day. On judgment and sale in due course of law, the proceeds, which were not sufficient to satisfy their judgment, were paid over to Clark & Co., and Whitney realized nothing from his writ. This action was then brought. Plaintiff had judgment, and defendants appealed.

Buckner and Hill, for the appellants.

McConnell and Niles, for the respondent.

By Court, TERRY, C. J. This question touches the liability of the sheriff for not levying an attachment put in his hands on Sunday; the goods of defendant having been seized by his deputy on Monday, though the last writ came to his hands early on the same day, and was levied on the property which was disposed of by the last writ—so that the first remained unsatisfied. The principles which determine this case we think somewhat different from those argued at the bar.

The sheriff's liability rests on his breach of official duty. As he is bound to perform his duty, so is he responsible to every one who may be injured by his failure to discharge it. In respect to the execution of process, these official duties are well-defined by law. The law is reasonable in this as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence; but it requires no impossibilities, and imposes no unconscionable exactions. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency of the writ. He must, in such cases, execute the writ with all reasonable celerity. Whenever he can make the money on execution, or secure the debt by attachment, he must do it. But he is not held to the duty of starting on the instant after receiving a writ to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances. But this reasonable diligence depends upon the particular facts in connection with the duty. If, for example, a sheriff has execution against A, and has no special instruction

to execute it at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligations to execute it instantaneously as if he were so instructed, and there were circumstances of urgency. So in respect to an attachment. If an attachment were sued out on the ground of a defendant's fraud, or his being in the act of leaving the state, or removing his property, the very fact of the issuance of the attachment, or the making of the affidavit, would seem to indicate to the officer the necessity of immediate action. But generally, in the absence of special circumstances, an attachment issued for the security of a debt, under the old statute authorizing such a process, does not stand upon a more favorable footing, so far as regards the necessity of immediate service, than an execution.

It is true, the statute (Wood's Dig. 183, sec. 125) directs that the sheriff "shall execute the writ of attachment without delay;" but this was not intended to introduce a new rule. The expression "without delay" does not mean that the sheriff shall, the instant he receives process of this sort, lay aside all other business and proceed to execute it, unless some special reasons of urgency exist. The rule is thus stated by the supreme court of New York, in *Hinman v. Borden*, 10 Wend. 367 [25 Am. Dec. 568]. "A sheriff is bound to use all reasonable endeavors to execute process." It is true that some authorities hold the rule with more strictness. In *Lindsay's Ex'rs v. Armfield*, 3 Hawks, 548 [14 Am. Dec. 603], the sheriff was held liable for not levying from the seventh of October to the first of November following—no explanation being offered for the failure. Mr. Justice Hall says: "The law declares it to be the duty of the sheriff to execute all process which comes to his hands with the utmost expedition, or as soon after it comes into his hands as the nature of the case admits," and cites Bac. Abr., tit. Sheriff, N. That author holds the doctrine in the same language as that quoted. Mr. Justice Henderson, in the case in Hawks, states the doctrine a little different. He says: "The sheriff should proceed with all convenient speed to levy the execution." The learned American editor of Bacon cites, in support of the doctrine of the text, several cases which we have examined. None of them sustain the rule in its strictness, even if we are to regard the doctrine of Bacon as laying down a different rule, so far as the liability of the sheriff is concerned, from that held in Wendell and other cases; for Bacon says, in the next sentence to that quoted, that the

“sheriff must not show any favor, nor be guilty of unreasonable delay.” In *Kennedy v. Brant*, 6 Cranch, 187, Chief Justice Marshall holds that the marshal is bound to serve the process as soon as he reasonably can.

The question of unreasonable delay is a mixed question of law and fact, each case depending on its own circumstances; for, as we said before, the speed with which the sheriff must proceed may depend upon the apparent necessity for quick action. But we have found no case which holds that the mere delay of a few hours, without some showing of special urgency, has been held sufficient to charge the sheriff. If we suppose, then, that the process reached the hands of the principal sheriff at one o'clock on Monday morning, we do not perceive that the sheriff would have been liable—nothing else appearing—for failing to levy it before. But the particular facts of this case make it stronger for the sheriff. The attachment of plaintiff was placed in the principal sheriff's hands on the night of Sunday, between nine and ten o'clock. But it did not legally come to his hands as sheriff and for service until twelve o'clock. Fifteen minutes after twelve the other attachment came to the hands of the deputy; of this, it seems, the sheriff had no notice; and the deputy levied it at or about one o'clock. It seems, then, that the laches of the sheriff in delaying this levy for an hour at midnight is the foundation of his liability. This would be too harsh and unreasonable a requisition. It is plausibly argued that the deputy and his principal are the same person in law; and that the attachment in the hands of the defendants is, in legal effect, in the hands of the principal; and consequently, the case is that of an officer having a senior writ and levying a junior writ on the property of the defendant. But the answer to this argument is, that here the question is one of diligence; and that it cannot be contended that the mere omission of the deputy to inform the principal of his having process is such negligence as to charge him.

We have seen that the sheriff is not absolutely responsible for not executing process of this sort. He is responsible for unreasonably or not reasonably executing such process. But the test is, was a failure, in the absence of any special circumstances, to execute this process unreasonable? or did it subject the sheriff to responsibility for the debt? We may, in this connection, leave out of question this discussion as to the day (Sunday) on which the writ of the plaintiff was received. It is certain that for all judicial purposes Sunday is no day at

all. The sheriff need not on that day indorse on the writ the fact of its reception. If given to him on that day, he did not receive it as an officer, but as the mere agent of the plaintiff. He could do nothing with it on that day. He might, if he chose, recognize the receipt of it, but it imposed on him no higher or other duties than if he had received it on the next day. He, for all practical purposes, so far as respects this writ, was not the sheriff at all on Sunday. But we may safely concede, for all the purposes of this suit, that he received the process on the next day, and even at the beginning of that day. Was he bound, then, on this assumption, to go on and execute the writ immediately after having received it, no peculiar necessity or apparent reason being shown why he should do so? No authorities have been cited to show that a sheriff is bound to quit everything else, immediately on receiving an attachment or execution, and proceed to levy.

The deputy had received Clark & Co.'s attachment early in the morning of Monday; perhaps at the very instant which marked the period which separated Sunday from Monday in the computation of time. But though Whitney's writ was in the hands of the sheriff before this time, yet the sheriff could do nothing with it—did not legally even receive it in his official capacity before. His connection with the writ of Whitney, as sheriff, commenced at the very time—at the utmost—when his deputy had the writ of Clark. But if Clark had no writ, we do not see that the sheriff would have been bound to go at once, on the instant, when Monday commenced, and levy on the property of the defendants in attachment. Nor was the sheriff bound to the degree of diligence which required him to communicate to his deputy the intelligence that he had received the writ of Whitney before the deputy levied the process of Clark. Attachments do not bind the property of the defendant from the time of the issuance, but only from the time of the actual levy; and the attachment first levied, by our statute, has the priority.

But probably we might put this case on a broader ground. The sheriff could no more officially receive a writ on Sunday, for service on Sunday, than he could execute it on Sunday. Both these acts are of the same general character, and equally within the prohibition of the statute. Not receiving it, then, as sheriff, he received it as the mere agent of the plaintiff. He so received it, not to execute it on Sunday, or to deal with it as a writ coming to him on that day as an officer. He might have been bound, as an agent, to deliver it

to the sheriff, or to treat it as delivered when he could act. But this was a personal, not an official, contract; it was a mere bailment which bound him, probably, as a man, but did not bind him as a sheriff; and if he chose to disregard it entirely, we do not see that he would be bound as an officer. It is not necessary to press this point, for the reason that if he was bound to consider it as placed in his hands on Monday, at one o'clock, there was no such negligence in failing to execute it before as to subject him to liability. It is true that it may be urged that the sheriff and the deputy are one person in law: true so far as this, that the sheriff is responsible for the acts of the deputy; but no one would contend that if a sheriff has a deputy at a remote precinct of a county, and a writ is placed in his hands, and he executes it on property in his precinct, that the sheriff would be responsible for this, if the consequence were to deprive B of the recovery of a claim as the result of this levy—B having put a writ in the hands of the sheriff at the county seat an hour before the writ was placed in the hands of the deputy. Whitney trusted the sheriff to consider that the writ would be in his hands on Monday, and to receive and execute it as if it were handed to him on that day; but even if it had been, the sheriff was not bound to get out of his bed (no special circumstances existing) on the morning of that day, at one o'clock, and immediately proceed to the execution of the writ. It would be unjust to hold the sheriff to this degree of diligence, and we think illegal.

We reverse the judgment and remand the case.

FIELD, J., concurred.

PROCESS, DILIGENCE NECESSARY TO BE USED IN EXECUTION OF: See *Hinman v. Borden*, 25 Am. Dec. 568, and note 569.

SHERIFF LIABLE FOR ACTS OF DEPUTY: See *State v. Moore*, 61 Am. Dec. 563, and note 565. The principal case is cited to the point that an officer is liable for a trespass committed by his deputy: *Hirsch v. Rand*, 39 Cal. 318.

PARKS v. ALTA CALIFORNIA TELEGRAPH COMPANY.

[18 CALIFORNIA, 422.]

TELEGRAPH COMPANIES ARE COMMON CARRIERS, and are subject to the rules of law governing such carriers.

ON BREACH OF CONTRACT TO DELIVER TELEGRAPHIC MESSAGE, the telegraph company is liable, not only for the cost of sending the message, but for the natural and proximate damages resulting from the breach of contract.

WHERE TELEGRAPH COMPANY CONTRACTS TO SEND DISPATCH, authorizing the sender's agent to secure a debt due by means of attachment, and by the negligence of the company in sending the dispatch the other creditors of the common debtor obtain the first attachment and exhaust the assets of the debtor, when if the company had properly performed its contract within a reasonable time the sender of the dispatch would have been enabled to make the amount of his debt, the company is liable for such natural and proximate damages as resulted from breach of the contract, which would include the amount of the debt.

APPEAL from the district court of the sixth judicial district. The facts are stated in the opinion.

George Cadwalader, for the appellant.

H. H. Hartley, for the respondent.

By Court, **BALDWIN, J.** On the seventh day of October, 1856, about seven o'clock P. M., the defendant contracted with the plaintiff, at Mokelumne Hill, for the immediate dispatch of a message to the city of Stockton. The dispatch was directed to the agent of the plaintiff, in these words: "Due, 1,800; attach if you can find property; will send note by to-morrow's stage." This was in answer to a dispatch by the same line received that morning from plaintiff's agent, informing the plaintiff of the failure of a firm of Gillingham & Co., and inquiring the amount due from them to him. An accident prevented the sending of the message, of which the plaintiff was not informed until nine o'clock A. M. of the next day. The dispatch was forwarded the next day, which reached the agent at about twelve M., but the writ was not delivered to the sheriff until six P. M. At that time, other attachments had been issued at the suit of other creditors, and the property of the defendants all seized under these subsequent attachments, so that nothing was made by the plaintiff's writ. The firm are now insolvent, and the plaintiff claims that he has lost his debt by the failure of defendant to transmit this message.

It is found that this failure to send the message was by the gross neglect of the defendant's agent.

Some evidence was offered tending to show that the debt of plaintiff would have been made if the transmission had been made in time, or if the defendant's agent had informed the plaintiff that the defendant could not send the dispatch, that the plaintiff would have gone that night to Stockton, and been in the city early the next morning in time to have taken proceedings before the other creditors sued and levied.

The rules of law which govern the liability of telegraph com-

panies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other is or may be attended with the same consequences; and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both respects is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules. Nor do we perceive the difficulty experienced by the learned judge below, either in estimating the damages or ascertaining the cause of them. The process of ascertainment is the same in this as in other cases of carriers. The breach of the contract entitled the plaintiff to nominal damages, if no real damages were shown. The question of real or special damages was a question of fact, and this question is dependent upon certain considerations which probably, in this case, could have been better left to a jury under appropriate instructions than decided by the court. For example, the plaintiff had a right to have his message sent according to contract. To ascertain the damages sustained by the breach of this contract, these inquiries are pertinent: If the message had been sent, was the plaintiff's agent in Stockton at the time? and would he have received it? Next, would he have then taken out an attachment on the debt? At what time could he have done this? Could he have given security? Could he have procured attorneys to issue the writ? At what hour could and would it have been put in the hands of the sheriff? Was property there of the debtor's subject to the writ? If a telegraphic dispatch had reached the agent at eight o'clock on the seventh, the agent would have been bound to act at once; it is to be presumed that he would have done so; at least, he can testify whether he would. If he had, the sheriff is to be presumed willing to do his duty; if he did not, he would be liable to the plaintiff; and thereby the plaintiff's debt would be secured.

We see no greater difficulty in this case than in a large class of cases upon which courts have frequently adjudicated. Take

the case of an attorney: a note is placed in his hands for collection; he fails to sue; other creditors sue on claims placed later in the hands of other attorneys; these last get judgments, and exhaust the property of the common debtor. Upon showing that the claim was just; that the attorney failed to sue; that other creditors sued and obtained judgment on suits commenced later than the time the attorney might and ought to have sued, the attorney is held liable. It is true that it might be argued that all the intermediate persons might or might not have neglected their duties; but it is not to be presumed. On the contrary, the presumption of law is, that persons intrusted with specific duties will perform them; or if there is no presumption on the subject, the question whether they would, if the defendant had done its duty, becomes a question of proof for a jury or for the court.

Suppose a man, on the eve of the expiration of a policy of insurance on his house, telegraphs to his agent to renew the policy immediately, the agent having the funds and the authority of the principal, and the telegraph company neglects to forward the message, and the house is burned a few days afterwards, could the company defend upon the ground that it could not be known whether the agent would have insured or not? Or, suppose that A bargains for a telegraphic dispatch to his agent to protest a bill of exchange, could the company, if it neglected to send it, set up that the damages were too remote, for it could not be known whether the agent would have taken the bill to the notary, or the notary protested, or given the notice? or whether, if the notice were given, the indorser could have been compelled to pay. Would not the contract, the fact of the bill being due, the agent in the place, the notary at hand, the apparent solvency of the indorser, be enough to charge the company? At all events, would not the plaintiff be allowed to prove that these things would have been done by the testimony of those who know or have opportunities of knowing the facts, in order to make out his case against the company?

It seems to us that the loss of the debt would be the natural and proximate damages resulting from this breach of contract; and so in this case the plaintiff had a debt on Gillingham & Co.; he wished to get out an attachment; he contracted with the defendant for the conveyance of a telegraphic message to his agent to take out an attachment; in the usual course of things, if the message had been delivered, the agent would have received it on the evening of the seventh; the papers could, with

the most ordinary diligence, have been made out, and the writ issued early on the morning of the eighth; placed in the sheriff's hands shortly afterwards, the plaintiff's writ would have been entitled to precedence over most of these attachments; there was enough property, as seems to be admitted, to secure the debt. If the facts warrant these conclusions, the plaintiff, we think, was entitled to judgment.

As, however, the court below has not found these facts directly and distinctly, we think it better to remand this cause, that a full investigation may be had. We are not to be understood as assuming these statements as facts fully proved. We only take them to be such for the purpose of the legal propositions announced. Upon another trial, the facts can be fully elicited, and the conclusions reached from the proofs, without any prejudice arising from this opinion.

The opinion of the court below is not in accordance with these views, and the judgment is reversed, and cause remanded for another trial.

TERRY, C. J., concurred.

TELEGRAPH COMPANY IS LIABLE AS COMMON CARRIER: *Tyler v. Western Union Tel. Co.*, 60 Ill. 427; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 440; and for non-delivery of a message with reasonable diligence, is liable for such damages as naturally result: *Truce v. International Tel. Co.*, 60 Mo. 27; S. C., 11 Am. Rep. 168. The telegraph company is bound, just as a common carrier, to use necessary and reasonable care, skillful means, and proper instruments in the fulfillment of its contracts: *Manville v. Western Union Tel. Co.*, 37 Iowa, 218; S. C., 11 Am. Rep. 12. All the above cases cite the principal case.

MORRISON v. WILSON.

[13 CALIFORNIA, 494.]

IN ACTION OF EJECTMENT, PERFECT EQUITABLE DEFENSE, UNITED WITH POSSESSION, is in California equivalent to a legal title.

WIFE'S SEPARATE ESTATE, WHETHER LEGAL OR EQUITABLE, in the absence of statute, cannot be conveyed except by the joint deed of herself and husband.

DOCTRINE OF ESTOPPEL IN PARS IS NOT APPLICABLE TO ESTATES OF MARRIED WOMEN.

CALIFORNIA MARRIED WOMAN'S PROPERTY ACT OF 1850 is enabling only; and on conveyance by a married woman of her separate estate, title vests in her grantee only on compliance with the mode of conveyance prescribed by statute, and the conveyance of a married woman, not executed in accordance therewith, is generally invalid.

FRAUD AFFECTS MARRIED WOMAN'S CONTRACTS SO AS TO PREVENT THEIR ENFORCEMENT, but not so that a fraudulent representation will divest the woman's title, in the face of a statute declaring a different and exclusive mode of divestiture.

WHERE LAND IS BOUGHT FOR MARRIED WOMAN, AND DEED TAKEN IN NAME OF ANOTHER, under an executory agreement on the part of the latter to convey to her on the payment of a certain sum, and she goes into possession, her entry is under a claim of right, with a vested equitable interest in the land, which, on payment of the sum agreed, becomes a perfect equity. And if the married woman, before the payment of said money, acquires the real title from a different source, the first deed being from parties without title, such real title is not divested in favor of the vendee or mortgagee of such third person, because she holds the inferior title from him, or claimed or entered under such title.

TITLE OF MARRIED WOMAN CANNOT BE DIVESTED by an estoppel based on the fact she took or claimed possession under a bad title.

POSSESSION OF LAND IS NOTICE OF EQUITIES under which party holds.

DEED TO MARRIED WOMAN IS PRIMA FACIE VALID.

DEED TO MARRIED WOMAN PRIMA FACIE CREATES SEPARATE ESTATE IN HER, where it recites that the consideration was paid by another for her exclusive benefit.

EJECTMENT. The opinion states the facts.

J. D. Thornton, for the appellants.

G. F. and W. H. Sharp, for the respondent.

By Court, BALDWIN, J. We understand the merits of this controversy to depend upon this state of facts: One Ford obtained a deed for the lot in dispute from Hitchcock and Van Winkle, who had no title, but claimed under a Colton grant. Ford bought from Mrs. Wilson, though the title was taken in the name of Ford for her and at her instance. Nearly contemporaneously, Ford executed to Mrs. Wilson an agreement to convey to her, as her separate property, this lot, on the payment of three hundred dollars, which sum there was evidence to show she paid, and the money was advanced as a gift to her by her son. Previously to this time, she had received a deed from another source, and this last seems to be the better title. The plaintiffs offered evidence tending to show that in consideration of a debt due for the building of the house, and a waiver of a lien on it, to one Perkins, Ford, at the instance of Wilson and wife, executed a mortgage on the premises, the latter representing at the time that Ford was the owner, and in consequence of this representation the mortgage was so taken. Plaintiff claims through this mortgage and sale under it. He asserts that this gives to him the right as against Mrs. Wilson,

on the ground of estoppel: 1. Because she, having entered under Ford, cannot dispute his title or that of Ford's representative, the plaintiff here; 2. Because these representations, acted on, estop her from denying the title to be in Ford.

We think neither ground can be maintained. If the purchase were made by Ford in his own name for the benefit of Mrs. Wilson, Ford would be morally, if not legally, her trustee; and if Ford, at or shortly after this time, gave her a writing to convey to her, on payment of the three hundred dollars, the two papers may be construed together if they are shown to be parts of one general transaction. On the payment of the purchase-money, Mrs. Wilson had a perfect equity, which, united with the possession, was equivalent in our system, for all purposes of this defense, to a legal estate. This estate she could not convey except by joint deed of her husband and herself, any more than if it were a legal estate. The cases of *Jenkins v. McConico*, 26 Ala. 213, and *Lee v. Bank of United States*, 9 Leigh, 218, and the authorities cited, are conclusive on this point, even in the absence of statutory provisions like the sixth section of our act regulating the disposition of estates of *femes covert*. The case of *Ingoldsby v. Juan*, 12 Cal. 564, is not opposed to this view, for the doctrine there is limited to conveyances of married women of separate estates vested before the passage of the act of 1850. The doctrine of estoppel *in pais* has no application to the estates of married women; for the act of 1850 is enabling, the estate vesting only after compliance with the mode of conveyance prescribed by the statute. *Palmer v. Cross*, 1 Smed. & M. 48, is a case upon a statute similar to our own. It was shown there that the wife stood by and saw some personal property sold by the husband as his own; and it was contended that she was estopped from afterwards claiming it. But the court said: "The law has thrown certain guards around a married woman to protect her from the influence of her husband. It has provided a mode by which alone she can be deprived of her real estate, and, to use no stronger language, it is certainly very doubtful whether she can be deprived of her separate personal estate in any other mode than the one prescribed by the instrument of settlement. The supreme court of the United States, in the case already cited from 13 Pet. 107, decided that the mere silence of Mrs. Lee as to her title, and her failure to obtrude her rights upon the notice of others, could not divest her of her property." The general rule is, that if the conveyance of a *feme covert* be

not executed according to the forms prescribed by the statute, it is not valid: *Elliott v. Piersol*, 1 Pet. 328; *Hepburn v. Dubois*, 12 Id. 345; *West v. West*, 10 Serg. & R. 445; see also *James v. Fisk*, 9 Smed. & M. 152 [47 Am. Dec. 111]. And accordingly, it has often been held that when the acknowledgment was defective in any substantial particular, the *feme's* title did not pass. It would be strange if a mere defect of this kind avoided the deed, though regularly signed and proved to have been fairly and voluntarily made, and yet a loose declaration of the *feme*, in the presence of the husband, and possibly made by his connivance or constraint, and in total ignorance by the wife of its legal effect, or even of the real facts of the transaction, could pass her estate. It is obvious, if this be the rule, that every deed of the husband might be an estoppel, whether acknowledged or not according to law, or even signed by the wife, since the representation in the presence of a purchaser or mortgagee, by the wife, of the property being the husband's, would be sufficient to estop her from denying the title to be in him. In truth, the paper signed by him in her presence, purporting to convey the property as his, would amount to such representation and consequent estoppel. It is true that it is said by some writers that fraud vitiates all contracts, even those made by infants or *femes*; but we apprehend that in cases of married women, under statutes like ours, this doctrine is limited to this, that a contract so infected cannot be enforced; but not that a fraudulent representation will divest a *feme's* title in the face of a statute declaring a different and exclusive mode of divestiture.

The second instruction asked for by the plaintiff, and given by the court, directly contravenes this view. For the learned judge below told the jury that even if the defendants did not enter into possession of the lot under Ford, yet if they disclaimed title to induce Perkins to waive his lien and take a mortgage from Ford, this estopped her from contesting the title of plaintiffs deraigned through Ford.

It was a disputed fact whether the defendant entered under Ford, and perhaps the weight of evidence was that she did not.

If we concede that Mrs. Wilson entered under this executory agreement with Ford, she did so under claim of right, and with a vested equitable interest in the property, which, on payment of the purchase-money, became a perfect equity. This equity, as we have said, she could no more dispose of by estoppel *in pais*, than if it were a legal estate; but if she could, having received the real title from another source, we do not

perceive how that title is divested in favor of the plaintiff here, merely because she held an inferior title from Ford, or even entered or claimed under it. The result of such a doctrine would be to destroy the whole effect of the statute, for all a creditor or stranger would have to do in order to divest the title to real estate of a *feme covert* would be to get her or her husband to take and consent to hold under a bad title, and then both titles, by the doctrine of estoppel, might be subjected to a claim held by a predecessor under the vicious title. The good title was older in date than that acquired from Ford, and the evidence is by no means satisfactory that she entered under Ford, or that, in getting in the Van Winkle and Hitchcock title, she did or meant to do anything more than to strengthen the title she had before by getting in the outstanding claim. Besides, if the fact be, as stated by witnesses not contradicted, that Ford really bought for her, and made the executory agreement alluded to, we cannot perceive that she stood towards Ford in any other relation than any other purchaser having two titles; or that claiming or taking the last is any abandonment of the first. The possession in such a case, if not referred to the good title, would not be referred exclusively to the bad. But if we hold that a *feme covert* cannot be divested of a title by parol or an estoppel *in pais*, directly operating upon the title, it would be illogical to hold that such divestiture could be effected by an estoppel created by taking possession under a bad title.

It is not pretended that she entered as tenant of Ford. She entered, if at all, as purchaser. She held the equitable estate, Ford merely the legal title. Being in possession, this was a notice of the equity. The payment of the purchase-money perfected this equity, leaving nothing but the naked legal title outstanding in Ford, with a right to call for it at any time by Mrs. Wilson. Any person dealing with the estate was bound to inquire as to the true state of the title; and if the party in possession had a deed recorded, this was a notice of his or her title. A different question might arise if a *feme covert* was in possession under a deed or an executory agreement, not recorded, and a person dealing with the property on the faith of an apparent legal estate in another inquired of her, and she represented that she had no title, but that the title was in another, and the inquirer then dealt with that other as the owner. But we do not understand that was this case; at least, it does not seem to be so put to the jury. In this case, the mortgages

did not see the legal title in Ford, for it was not in him, and therefore did not deal with the property on the faith of it. It may be very true that Mrs. Wilson, being in possession under the good title and the vicious title, said to Perkins she held under the Ford title, and that it was the real title; but a *feme covert* could scarcely be held to forfeit a good title because she was not learned enough in land-law in 1851 or 1852 to know what has so puzzled the courts to determine—the relative strength of San Francisco titles.

We have all along assumed the fact that Mrs. Wilson held a good title under the deed from Minor. This deed was executed the seventh of May, 1851, and is made to her in exclusive property. A deed to a married woman is *prima facie* valid: *Harmon v. James et ux.*, 7 Smed. & M. 118 [45 Am. Dec. 296]. And this deed recites that the consideration money was paid by George W. Soule, for the exclusive benefit of Mrs. Wilson. This, it seems to us, *prima facie* created a separate estate in Mrs. Wilson. The deed, too, is witnessed by the same George W. Soule. It is true that on the third of May before, Minor executed a deed of the lot to Soule, but this deed was not acknowledged until the twenty-first of April, 1852, or recorded until April 27, 1852. When it was delivered does not appear. As between Soule and Mrs. Wilson, it would seem that the witnessing of the deed to Mrs. Wilson, with this recital, and especially with the possession taken by Mrs. Wilson—if such was the fact—would strongly imply that the deed to Soule by Minor was not delivered at the date of the deed to Mrs. Wilson, or if delivered, that the unrecorded deed of Soule was, by contract or consent, postponed to the latter deed. If the money paid by Soule was furnished by Mrs. Wilson, would not this be an estoppel against Soule's setting up his secret deed? Could he encourage or assist in giving effect to the last deed, and yet hold it good for nothing? It is not necessary to consider this point further, as it has not been argued; for upon the ground last taken, the judgment must be reversed; and this whole matter may be more fully presented on a future trial.

Nor is it necessary to decide whether if Mrs. Wilson and Ford were in possession, and Perkins, having no notice, by the record or otherwise, of Mrs. Wilson's title, inquired of Wilson and wife and Ford as to the title, and was informed that the title was in Ford, and accordingly dealt with Ford as if he were owner, and thereby released a valuable right, the title of Mrs.

Wilson would be bound by such a transaction. This question is left open and unaffected by this opinion.

Judgment reversed and cause remanded.

TERRY, C. J., concurred.

On petition for rehearing, the following opinion was delivered:

BALDWIN, J. The rehearing is denied. The main ground of reversal was the instruction of the court that whether Mrs. Wilson entered under Ford or not—which was a disputed fact before the jury—if the defendants (Mrs. Wilson being one) disclaimed title to induce Perkins to waive his lien and take a mortgage from Ford, this estopped her from contesting the title of plaintiffs deraigned through Ford. We meant to assert, and think we sustained the proposition by reason and authority, that a *feme covert* under our statute cannot divest her separate estate in any other mode than that pointed out by the act; for to hold otherwise would be to hold that the statute, where it says that the estate shall only be divested by joint deed of husband and wife, means that it may be divested by estoppel *in pais*.

As this error is sufficient to reverse the judgment, we so modify the opinion as to leave the other points discussed in it open to future discussion, as it is suggested with some plausibility, that a fuller examination may throw some light upon the questions, and the facts can be more fully presented.

TERRY, C. J., concurred.

EQUITABLE TITLE AS DEFENSE TO ACTION IN EJECTION: See *Neil v. Kees*, 51 Am. Dec. 746; extensive note to *Doggett v. Hart*, 58 Id. 472; *Tybeau v. Tybeau*, 59 Id. 329, note 331. The principal case is cited and followed on the point that such a defense may be interposed in *Blum v. Robertson*, 24 Cal. 141; *Hough v. Waters*, 30 Id. 311; *Love v. Watkins*, 45 Id. 566; *Ross v. Treadway*, 4 Nev. 460.

ESTOPPEL OF MARRIED WOMEN: See *Bradley v. Snyder*, 58 Am. Dec. 564, note 569. The principal case is cited to the point that a married woman cannot be estopped by matter *in pais*: *Childs v. McChesney*, 20 Iowa, 436; as by her silence: *Griswold v. Boley*, 1 Mont. 561.

WORDS CREATING SEPARATE ESTATE IN MARRIED WOMEN: See *Bacon v. Holt*, 64 Am. Dec. 585, and note; *Martin v. Bell*, 70 Id. 200, and note 203.

MARRIED WOMAN'S DEED OF SEPARATE ESTATE MUST BE EXECUTED IN FORM PRESCRIBED BY STATUTE, and unless conveyance is in such form, she is not divested of her estate: *Mason v. Brock*, 52 Am. Dec. 490, and note 493. And see the following cases citing the principal case to this point: *Harrison v. Brown*, 16 Cal. 290; *Maclay v. Love*, 25 Id. 374; *Dentzel v. Waldie*, 30 Id. 142; *Bodley v. Ferguson*, Id. 517; *Dow v. Gould & C. S. M. Co.*, 31 Id. 645, 654; *Leonis v. Lazarovich*, 55 Id. 57.

HARRIS v. REYNOLDS.

[18 CALIFORNIA, 514.]

WORDS "TENANT IN POSSESSION," IN SECTION 236 OF CALIFORNIA PRACTICE ACT, providing that the purchaser at a redemption sale "shall be entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation," embrace the judgment debtor as well as his lessee.

WORDS USED IN STATUTE, WHICH HAVE WELL-KNOWN AND DEFINITE MEANING in the law, are to be given such meaning in construing the statute.

JUDGMENT DEBTOR REMAINING IN POSSESSION OF WATER-DITCH AFTER SHERIFF'S SALE, and collecting the rents and profits during the six months following, is a trustee of the fund for the purchaser at the sale, under the California statute; and if the fund be in danger of loss, a bill in equity to account will lie.

APPEAL from the district court of the eleventh judicial district, county of Placer.

John Hume, for the appellant.

Sanderson and Newell, and Hewes, for the respondent.

By Court, BALDWIN, J. This bill is filed to settle and recover the value of the rents and profits of a certain ditch, or interest therein, bought by the plaintiff at sheriff's sale. The defendants are in possession. The proceeds of the sales of water, etc., sought to be recovered, arise from the property since the sheriff's sale, and before the expiration of the period limited by statute for the redemption. Treating this species of property as real estate, subject to its incidents and laws, we are brought to consider, as the main point presented by this appeal, whether these intermediate rents or profits go to the purchaser at the sheriff's sale, when the judgment debtor is in possession. This question involves the construction of section 236 of the practice act: Wood's Dig. 198. That section is in these words: "The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof." It is very true, as argued by the appellant, that a purchaser, by the mere fact of his purchase, does not get title to real estate. His right is rather the right to get a title in a given contingency, and the transaction an executory, not an executed, contract. But it does not follow, because he is not clothed with a perfect title, or even because he is not personally en-

titled to the possession, that he has no rights in the premises. He may have a perfect statutory right to the profits without having a right to the subject out of which the profits proceed. Indeed, it is conceded by the appellants that this is true as regards the party in possession, if that party is a tenant of the judgment debtor. A privilege of redemption is given to the judgment debtor; but it is uncertain whether he will exercise it. Time is not given for the purpose of enabling the debtor to make a profit out of the estate, but for the purpose of enabling him to raise the money to redeem. There is no presumption that the property sells for less than its present value; and there is no compulsion upon the part of the debtor to redeem, if he is able; and if he does not, the purchaser runs the risk of the title, the depreciation or destruction of the property, and in fact, all the risks attending the ownership of property. As the law holds him to the responsibilities of owner, it entitles him to the benefits of owner, so far as the right to the profits is concerned; but it gives this right without allowing the purchaser to disturb the possession of the debtor. This redemption system is a highly artificial plan, devised with care by the legislature, and introducing new and specific rules in respect to judicial sales. It must be supposed that the legislature have used legal terms according to their received legal interpretation.

The phrase "the tenant in possession" is a generic term, intended to designate the class of persons from whom the purchaser was to receive the rents. The language is not that when a tenant of the debtor is in possession the tenant shall pay the purchaser, or that the debtor when in possession shall not; but the phraseology designed, evidently, to fix a general right, applying to all cases of tenancy, for none are excluded.

It is not very easy to see the reason for such a distinction as that contended for. It would give but little help to the purchaser, since the debtor, on the eve of judgment, might change a possession by tenancy, and take possession personally; or change the terms of tenancy so as to make of little or no value the purchaser's right; and why should a debtor be any more inhibited from getting profit from rent than getting profit from use—in this case, from authorizing other persons to sell water, and selling it himself? The definition of "tenant in possession" embraces, within the natural and usual meaning of the words, a judgment debtor as well as his lessee. The owner in fee in possession is no less, in legal contemplation, a tenant

than the man who occupies under him. The definition of tenant is, "one that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will."

The rule of construction of statutes is plain. Where they make use of words and phrases of a well-known and definite sense in the law, they are to be received and expounded in the same sense in the statute: *United States v. McGill*, 1 Wash. 463; *Adams v. Turrentine*, 8 Ired. L. 149; *State v. Smith*, 5 Humph. 396; *Ex parte Vincent*, 26 Ala. 145 [62 Am. Dec. 714].

The concluding words of the section of the statute we are considering lends some strength to the construction we give; for after providing for the recovery of the rents of the property sold, the words "or the value of the use and occupation" are added; these latter words applying to and covering the case of the possession of the debtor.

If we could see a stronger reason for the distinction insisted on than we have been able to perceive, yet, as the language of the act is precise, and makes no exception of the judgment debtor, we could not, without interpolating a new provision into the statute, exclude a class of persons fully within the definition, any more than we could include a class not embraced by its terms.

The only other question is as to the remedy. It is argued that, conceding the plaintiff's right, a bill in equity of this sort is not the appropriate means of relief. But we think otherwise. The defendants, being in possession of this property, were trustees for the plaintiff. The profits consisted of many sales and transactions requiring the settlement of a long and complicated account, which could not well be settled at law; besides, many other equitable circumstances exist here—the alleged insolvency of defendants; the partial conversion of the fund; the threatened loss of it; the interest of other parties requiring adjustment and settlement. The further fact that Reynolds was the treasurer of the ditch company, into whose hands the installments due on the interest sold as his came, is also of force in showing the propriety of this remedy. The whole bill, however, might well rest on these facts, that the defendants were merely trustees of this fund for the plaintiff, and that the fund was in danger of loss; and these facts would uphold the power of chancery to protect the trust property.

Decree affirmed.

TERRY, C. J., concurred.

PURCHASER AT REDEMPTION SALE IS ENTITLED TO RECEIVE RENTS of the property during the period allowed for redemption: See *Knight v. Truett*, 31 Cal. 115; *Webster v. Cook*, 38 Id. 425; *Kline v. Chase*, 17 Id. 597, all of which are decided on the authority of the principal case on this point.

JUDGMENT DEBTOR REMAINING IN POSSESSION AFTER SALE, AND COLLECTING RENTS and profits, is a trustee of the fund for the purchaser at the sale: *Walls v. Walker*, 37 Cal. 432; *Connelly v. Dickson*, 76 Ind. 448; and if the fund be in danger, an accounting or appointment of a receiver may be had: *Hill v. Taylor*, 22 Cal. 194, all citing the principal case.

WORDS AND PHRASES IN STATUTES, CONSTRUCTION OF: See *Ex parte Vincent*, 62 Am. Dec. 714, and note.

SWIFT v. KRAEMER.

[13 CALIFORNIA, 526.]

EXECUTION BY OWNER OF LAND OF NEW MORTGAGE TO PERSONS WHO PAY OFF PRIOR MORTGAGES upon their being released, such execution and release taking place on the same day, operates in equity as an assignment of the old mortgages in consideration of the money advanced by the second mortgagors, and is not the creation of a new incumbrance, but changing the form of the old. Therefore, if after the execution of the first mortgage, but before executing the second, the mortgagor married, and the second mortgage was not signed by his wife, neither he nor his grantor, after his wife's death, can claim and hold the property free of the second mortgage, on the ground that the property became homestead property on the mortgagor's marriage, and was not subject to be incumbered by such second mortgage.

APPEAL from the district court of the twelfth judicial district, county of San Francisco. The opinion states the facts.

Pixley and Smith, for the appellants.

Sidney V. Smith, for the respondent.

By Court, BALDWIN, J. One Revalk, an unmarried man, in 1854, owned a lot in San Francisco; Leck and Fontacelli had a mortgage of two thousand dollars, and Kraemer a mortgage of one thousand five hundred dollars, on this lot. Revalk married in 1857, and after his marriage, made the mortgage, the validity and effect of which this suit questions. His wife did not join in the mortgage. The consideration of this last mortgage was that Kraemer canceled his prior mortgage of one thousand five hundred dollars, and gave five hundred dollars in cash, in addition, to Revalk, and one Eisenhardt paid the prior mortgage of two thousand dollars to Leck and Fontacelli. The release of the old and the redemption of the new mortgages were done on the same day. Revalk's wife died. and

Swift, the plaintiff here, purchased the mortgaged premises. He claims now that as he knew that the property was homestead at the time of the last mortgage, he was a purchaser without notice of any adverse claim, and that he takes the title free of the claim of the mortgagee. We do not think so. So far as the five hundred dollars is concerned, probably, within a recent decision, the husband had no right to encumber the property to that extent. But as to the debts secured by the original mortgage to Leck and Fontacelli and Kraemer, we regard the cancellation of the old mortgages and the substitution of the new as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release intended to be effectual only by force of and for the purpose of giving effect to the last mortgage to be set up, even if the last mortgage was inoperative. It would not permit Revalk to take Kraemer and Eisenhardt's money and apply it in extinguishment of a prior incumbrance, and then claim that the property should neither be bound by the new mortgage or the old. These last mortgagees would be, in equity, assignees of the debts they paid, and be subrogated to the rights of their assignors; for in equity, the substance of the transaction would be an assignment of the old mortgages in consideration of the money advanced. This, in effect, has been held in *Dillon v. Byrne*, 5 Cal. 455; *Burrell v. Schie*, 9 Id. 106; *Carr v. Caldwell*, 10 Id. 380 [70 Am. Dec. 740].

Nor does Swift stand in any better position than Revalk himself. Swift can only claim that he bought with notice of a parol fact, not that he was the purchaser of an apparent legal title, and ignorant of any better title or equity. In other words, he bought with knowledge of the fact which seemed to show a title in Revalk and wife. But this fact may be explained. What existed in parol might have been explained by parol. The mortgage on record was, at least, sufficient to lead him to inquiry, and then he was bound to make full inquiry. That would have resulted in information as to the true state of things. But we are not aware that it has ever been held that a party is estopped except by his own act or deed or that of his privies. Revalk's possession of the premises, with his wife, was no estoppel of Kraemer to show that the premises were not homestead. If they seemed to be, from the fact of this family occupancy, and Swift bought on the strength of this appearance,

he took the risk of this appearance turning out to be the reality; and if he was deceived, it is one of the unfortunate blunders common to all speculation.

The decision of this court in the numerous cases of Revalk touching this property make nothing for the appellant, for this question was not involved in those cases; and facts are not settled by judicial precedents, but only questions of law.

Decree affirmed.

TERRY, C. J., concurred.

EXECUTION OF NEW MORTGAGE SIMULTANEOUSLY WITH PAYMENT OF FIRST MORTGAGE operates as assignment of the first mortgage to the second mortgagee: See *Carr v. Caldwell*, 70 Am. Dec. 740, and note 742; and see *Barber v. Babel*, 36 Cal. 23, where the principal case is cited on this point. Such a transaction, if the mortgagor married after the first mortgage, would not, on the execution of the second mortgage, operate to give the wife seisin, so as to entitle her to dower or homestead right in the property: *Burnap v. Cook*, 16 Iowa, 154; *Walters v. Walters*, 73 Ind. 428, also citing the principal case.

CONROY v. WOODS.

[13 CALIFORNIA, 626.]

LIEN OF FIRM CREDITORS ON FIRM PROPERTY IS PARAMOUNT to that of individual creditors, though the latter attached first.

WHERE PARTNER BUYS INTEREST OF COPARTNERS IN FIRM, agreeing to pay the firm debts, the property of the firm remains bound for such debts just as before the sale.

CREDITOR OBTAINING LIEN BY ATTACHMENT IS ENTITLED TO FILE CREDITOR'S BILL without waiting for judgment and execution.

PARTNERS MAY MAKE BONA FIDE SALE OF THEIR PROPERTY at any time before their creditors acquire a lien; but a sale directly or indirectly to one of the partners, with a stipulation that he will pay the firm debts, is not such a *bona fide* sale so as to divest the property of its character as firm property, primarily liable for firm debts.

INDIVIDUAL CREDITOR OF PARTNER OBTAINS NO PRIORITY OVER FIRM PROPERTY, by the fact that he obtains judgment, issues execution, and levies thereon, as against firm creditors who have not yet obtained judgment.

EQUITY HAS JURISDICTION OF CONFLICT BETWEEN INDIVIDUAL AND FIRM CREDITORS.

NO ACTION LIES AGAINST SHERIFF FOR LEVYING EXECUTION of individual creditors of a partner on firm property in the latter's hands.

APPEAL from the district court of the twelfth judicial district. The facts are stated in the opinion.

George F. & W. H. Sharp, for the appellant.

Cyril V. Grey and Joseph Simpson, for the respondents.

By Court, BALDWIN, J. Bill states that on the twenty-second of April, 1857, plaintiffs sued out attachment against Bonny, Brooks, & Moore, a mercantile firm in San Francisco, and had it levied on certain goods; that shortly afterwards, plaintiffs got judgment in their suit, which has not been paid, and execution issued, with directions to the sheriff to levy on the property attached; that the debt of plaintiffs was for goods due by this firm at and before the ninth of April, 1857, and this property attached had belonged to and been in possession of said firm; that about this last date these defendants dissolved partnership by Brooks and Moore selling out to the defendant Bell, who bought subject to the payment of the debts of the firm; that no notice was given of this dissolution to plaintiffs until the sixteenth of May, 1857; that Bell bought for Bonny, and afterwards transferred his rights to Bonny; that at the time of this sale, all these parties knew of this indebtedness to plaintiffs; that on the tenth of April, 1857, defendant F. H. Woods commenced a suit in this court against E. Bonny, and attached the property as his individual property, and afterwards obtained judgment. Execution issued and levied upon the property, and it was advertised for sale as Bonny's. The bill then charges various matters of fraud in the sale to Bonny, and in the note and suit of Woods and Bonny.

Several parties appeared as intervenors, claiming to be entitled to come in as judgment creditors of this firm, and alleging substantially the same facts as the plaintiffs. Woods demurred on several grounds, which will be noticed hereafter, and, the demurrer having been overruled, answered. The answer denies that the plaintiffs attached the property or any part of it, or took it in execution; also denies that on the ninth of April, 1857, the partnership of Bonny, Brooks, & Moore existed; says it was dissolved on the fourth of April, 1857, the dissolution was notorious, and plaintiffs had notice of it. On the tenth of April, 1857, defendant commenced suit against Bonny, and attached property, recovered judgment, and caused property to be taken in execution. At this time, defendant had no knowledge of the claim of the plaintiff; the property was that of Bonny and in his possession, and defendant, by his attachment, acquired a lien on it. Defendant was, at the time of his suit, the sole owner of the note sued on by him,

and that it was all justly due and owing to defendant by Bonny; of the amount, one thousand one hundred and thirty dollars was a debt due from Bonny, Brooks, & Moore; denies that he aided in bringing about the dissolution of the firm, and also all fraud or connection with any; or all knowledge of any trust, or lien, or condition for benefit of creditors in the sale to Bonny by the parties; and denies it to be the fact that it was so transferred; that one Alison brought suit for the property; that this defendant pleaded that the property was the individual property of Bonny, and his attachment a lien on it; that the suit was decided in favor of defendant; and that the plaintiffs had notice of these facts and made no claim to the property; denies that Bonny, Brooks, & Moore have not property sufficient to satisfy claim of plaintiffs.

A great deal of proof was taken, oral and documentary. The court below found that the material allegations of the complaint were proved.

The ground upon which the learned judge places his decree in favor of the plaintiffs and intervenors is, that the lien of the firm creditors of Bonny, Brooks, & Moore is paramount to that of the individual creditor of Bonny. It has been seen that Bonny bought out the other two partners, and agreed to pay the firm debts. We say he agreed to buy them out; for the mere disguise of this process—by means of the sale to Bell, and his transfer, a few days afterwards, to Bonny—is, when taken with the facts and the answer, too thin to permit us to doubt that Bell acted merely as the agent of Bonny in this transaction. Bonny then held the firm assets; and the question is, having got the title to them in this way, whether they stood anywise differently as respects the firm creditors than if the firm had continued. If the firm had continued, it is not disputed that the rights of the firm creditors would have been prior and paramount to those of an individual creditor; and it is not easy to see any substantial difference in respect to the principle we are considering, between one partner's buying out his associate's share, on agreement to pay the debts of the firm, and suffering the firm name to continue. This was partnership property bound for partnership debts when the firm was in existence, and it continued to be bound for those debts after the sale to this partner, especially when he assumed, as a part of the transaction of purchase, the payment of those debts. Story on Partnership, sec. 97, thus lays down the rule: "In short, as between the partners themselves, the debts and liabil-

ities of the firm to creditors and third persons are a fund appropriated, in the first instance, to the discharge and payment of such debts and liabilities, and there is, properly speaking, as between them, a lien thereon, or at least an equity, which may be worked out through the partners in favor of the creditors, although it may not directly attach in the creditors by virtue of their original claims, in all cases. Each partner also has a specific lien on the present and future property of the partnership, not only for the debts and liabilities due to third persons, but also for his amount or share of the capital, stock, and funds, and for all moneys advanced by him for the use of the firm, and also for all debts due to the firm for moneys abstracted by any other partner from such stock and funds beyond his share. It follows, from this principle, that if any partner takes the whole or a part of his share out of the partnership stock, the stock so taken, if identified, is applicable to the payment of what shall, upon an account taken, be found due from him to the partnership, before any of it can be applied to the payment of his debts, due to his own separate creditors; for such partner has an interest in the stock only to the amount of the ultimate balance due to him, as his share of the stock. The same rule will apply to any other property into which the partnership property may have been converted, so far and so long as its original character and identity can be distinctly traced. Hence it may be stated, as a general corollary from the foregoing considerations, that no separate creditor of any partner can acquire any right, title, or interest in the partnership stock, funds, or effects, by process or otherwise, merely in his character as such creditor, except for so much as belongs to that partner, as his share or balance, after all prior claims thereon are deducted and satisfied." See also 2 Story's Eq. Jur., sec. 1253.

In *Greenwood v. Brodhead*, 8 Barb. 594, the rights of creditors in such a case are discussed. The court say there is no doubt that joint creditors can, under certain circumstances, have a right of priority of payment out of partnership property, in preference to the private creditors of any separate partner; and *Wilder v. Keeler*, 3 Paige, 167 [23 Am. Dec. 781]; *Hall v. Hall*, 2 McCord Ch. 302; 2 Story's Eq. Jur., sec. 1253; *Jackson v. Cornell*, 1 Sandf. Ch. 348, are cited.

The section of Story's Equity referred to holds: "The creditors, indeed, have no lien, but they have something approaching to a lien; that is, they have a right to sue at law, and by

judgment and execution to obtain possession of the property, and in equity to follow it as a trust." So it is said in *Greenwood v. Brodhead*, *supra*: "The creditor must proceed to obtain a lien on the property before he can interfere to control it. If it be real estate, he obtains the lien by judgment; if personal property liable to execution, by levy under process; and if choses in action, by the return of an execution unsatisfied after filing a complaint."

In this case, the plaintiff had, before the filing of his bill, a lien by attachment, and a judgment. We see no necessity for the levy of an execution. It would have answered no beneficial purpose; it was not necessary to give a lien; that had already accrued from the levy of the attachment; and it was not necessary for a sale, for a sale was not desired. The intervenors also had attachments levied; that gave them a lien, and if they had waited for the filing of their bill until judgment was obtained, it might have been too late. At the time of the trial, they had obtained and produced their judgments. The authorities do not place the right to go into equity upon the ground that the plaintiffs must show themselves to be creditors by judgment; but they go on the ground that they must show a lien on the property; and this lien exists as well by the levy of an attachment as by execution.

It is true, it is said in *Greenwood v. Brodhead*, 8 Barb. 594, "that until such lien is obtained, the partners have power to make any *bona fide* sale of the property they think proper. But when such lien exists, the creditor may claim the aid of the court to restrain the disposition of the property by injunction, to have it placed in charge of a receiver, and to compel its equitable application." But we do not understand by the *bona fide* sale here spoken of a sale, directly or indirectly, to one of the partners, accompanied with a stipulation that he shall pay the firm debts.

Indeed, this very question was decided in *Sedam v. Williams*, 4 McLean, 51. But it scarcely needs authority to prove that if this equity existed against the three partners, or the firm property when owned by the three, it lost none of its force from the mere fact that the sole title to the property became lodged in the hands of one of them, no credit having been given by individual creditors on the strength of an apparent sole ownership in the vendee.

Woods seems to have had notice of these facts; and if he had not, the mere fact of his getting his separate judgment, and

issuing execution, and making a levy, gave him no title to this property as against the superior equity of these firm creditors.

We think that a court of equity has jurisdiction of this case. No action against the sheriff would lie for a levy, and the property would, perhaps, be lost by a sale of it to different purchasers: *Place v. Sweetzer*, 16 Ohio, 142; *Washburn v. Bank of Bellows Falls*, 19 Vt. 286.

The other points are not well taken.

Woods is the only appellant here, and he can complain of no error not to his prejudice.

Decree affirmed.

See *Heyneman v. Dannenberg*, 6 Cal. 376 [85 Am. Dec. 319]; *Scales v. Scott*, 13 Id. 76.

TERRY, C. J., concurred.

PARTNERSHIP CREDITORS AND CREDITORS OF INDIVIDUAL PARTNERS, LIENS AND PRIORITIES OF, concerning partnership property: See *Coover's Appeal*, 70 Am. Dec. 149, and note 150; *Miller v. Estill*, 67 Id. 305; *Tillinghast v. Champlin*, Id. 510, and notes to both cases. The principal case is cited as an authority on the law of this subject: *Reddington v. Waldon*, 22 Cal. 187. A partnership creditor has a right of priority to payment of his debt from the firm assets: *Bullock v. Hubbard*, 23 Id. 502; *Jones v. Parsons*, 25 Id. 106, 107; *Durham v. Craig*, 79 Ind. 123, all citing the principal case; and the individual creditor obtains no priority by the fact that he has a prior judgment: *Barpee v. Burn*, 22 Cal. 199, citing the principal case.

TAFFTS v. MANLOVE.

[14 CALIFORNIA, 47.]

WRIT OF ATTACHMENT IS ONLY EFFECTUAL TO CHANGE TITLE TO GOODS FROM TIME OF ITS LEVY.

LEVY OF WRIT OF ATTACHMENT MAY BE GOOD AS AGAINST DEFENDANT THEREIN, and not as to third persons. This is not so from any difference in the legal requisites of a levy, but arises where certain acts of such defendant may constitute a waiver, from an agreement by him, or by way of estoppel.

ACTS HELD NOT TO CONSTITUTE LEVY OF WRIT OF ATTACHMENT.—Writ of attachment being placed in sheriff's hands, he proceeded, in company with a sworn keeper, to levy it upon goods in defendant's store. On arriving at the store they found it locked, and the sheriff placed the keeper at the rear door, and himself stood near the front door, thus preventing any one from entering or departing from the store. While the sheriff was standing, thus deliberating how to effect an entrance, defendant filed his petition in insolvency, and procured an order from the court staying all proceedings at the suit of his creditors against him. Defendant and his attorney then informed the sheriff of this restraining order.

but showed him no written evidence of it, whereupon he demanded of them the key to the store, which they gave him, and he entered and took possession of its contents. *Held*, that the levy had not been perfected before the restraining order was made. Before entering, the officer did not know what goods were in the store, he had made no note or memorandum of the levy, and in all probability did not consider that he had seized the goods.

LEVY UPON PERSONAL PROPERTY IS ACT OF TAKING POSSESSION OF, seizing, or attaching it, by the sheriff or other officer. As against the defendant, no great strictness of form is necessary; the entering up of his property with his assent is sufficient. But it is too plain for argument that there can be no levy when the officer does not even know the subject of the levy.

UPON FILING OF PETITION IN INSOLVENCY, it is the duty of the court to make an order that all proceedings against the debtor be stayed. This order takes effect from the making of it; it does not have to be served upon the sheriff or a creditor to give it effect.

UPON FILING OF PETITION IN INSOLVENCY, judicial control and dominion of the insolvent's estate is transferred to the court, and after this transfer a creditor cannot seize or interfere with it.

APPEAL from the sixth judicial district. The opinion states the facts.

Latham and Sunderland, for the appellant.

Clark and Gass, for the respondents.

By Court, **BALDWIN, J.** Upon this state of facts, the several questions of law argued by the counsel arise: One Hill, an insolvent debtor, a few minutes after twelve o'clock P. M. of the second of November, 1857, filed in the clerk's office of the district court his petition of insolvency, with a schedule annexed, together with an order from the district judge staying all proceedings at the suit of his creditors against him. About three minutes after twelve o'clock of the same day, Gilman & Co. filed a complaint and issued an attachment against Hill, which writ was placed in the hands of the sheriff. At five minutes past twelve, the deputy sheriff, with a sworn keeper, started to the store of Hill, where they arrived at ten minutes after twelve o'clock. The store-house was a fire-proof brick building used only as a store, and fastened in front and rear by iron shutters. The store seems to have been closed. The deputy placed the keeper in the rear, and kept possession of the front door, so that no one could go in or come out of the store. While there, about twenty minutes after twelve o'clock, Hill and his attorney came to the front door, when the attorney told the deputy that Hill had filed his petition in insolvency, and

that the judge had issued a restraining order. The deputy sheriff asked the attorney if he had any papers to show, and the attorney said he had not. The deputy then told Hill that he was about to break open the door of the store, when the key was given to him. He then opened the doors, entered the store, levied on the contents of it, made out an inventory, and left a keeper in charge. The writ with a return of levy was filed in the clerk's office. The order of stay of proceedings was served on the sheriff or his deputy. By consent of the defendants, the goods attached were sold by the sheriff and the money paid into the clerk's hands to abide the decision. It seems to be agreed that the issuance of the attachment and its reception by the sheriff, and his deputy's acts at the store before it was opened, were all prior to the filing of Hill's petition and the order of the judge, though the actual entry and view and seizure of the goods were subsequent to the petition and order.

Upon this state of facts, two propositions are made by the appellant: 1. That the acts of the officer prior to the entry into the building constitute a sufficient levy upon the goods in the store; 2. That if this be not so, yet the order of the judge staying proceedings after the filing of the insolvent's petition was no bar to the subsequent actual seizure of the goods, in the absence of a legal service of the order upon the attaching creditor or the sheriff. As the writ of attachment is only effectual to change the title of goods from the levy of the process, the question arises, What constitutes a levy valid and sufficient in law to vest the property? It may be admitted, as unquestionably the law is, that a levy may be good as against the defendant in the writ when it would not be good as to third persons. But we apprehended that this distinction is not based upon any difference in the legal requisites of a levy, but in the fact that the conduct of the defendant, either by positive or negative acts, may amount to a waiver or an estoppel or agreement that that shall be a levy which, without such conduct, would not be sufficient. However this may be, we can conceive of no principle of law, and have been referred to no case, which holds that the acts relied on by appellant constitute a levy. Waiving everything else, the essential element of an intention to levy prior to the entry seems to be wholly wanting, from anything we can see in the agreed statement. That the sheriff came to the house in order to make the levy is very certain; but that he intended to make or considered he had made a levy on goods in the house, by standing at one

door and putting his companion at the other, does not appear. He made then no note or memorandum of the levy—did not perhaps even know what goods were in the store, their description or value; and besides this, demanded the key afterward and entered, and then seized the goods, took the inventory, and indorsed the levy. There is neither proof nor probability that, before this time, he considered he had seized the goods, or if he did, we think he was clearly mistaken.

In Crocker on Sheriffs, sec. 425, p. 172, it is said: "A levy upon personal property is the act of taking possession of, seizing, or attaching it by the sheriff or other officer," etc. It is true, the author, in section 427, says: "As against the defendant in execution, no great strictness of form will be necessary in making a levy upon personal property. Thus the mere entering by the sheriff of the property of the defendant, with his assent, upon the execution, will be conclusive upon such defendant, though the property is not present, and the officer does not know where it is." But this authority, and the cases cited by appellant's counsel, are far from proving the proposition they labor for. It is not necessary to review these cases, for all of them turn upon a wholly different principle from that invoked—the principle, namely, that the assent of the defendant is sufficient as against him, even where the goods are not within view, or subject to the dominion of the officer.

But it cannot be necessary to pursue this inquiry. It is too plain for argument that there can be no levy when the officer does not even know the subject of the levy. As well might a sheriff stand in the street and levy upon the contents of a banking-house as to stand in a store door at midnight, and claim that merely by standing there and preventing any person from coming into the store he had levied on the contents, whatever they were, of the store; and this, without having any knowledge of the general nature of the stock, much less of the particular description or value. But, as we said before, nothing appears to show that the mere watching and guarding of the store-house was meant to be a levy on the property inside; but these were acts merely in prosecution of the design to enter the house and levy on the property there, which purpose was afterward accomplished. But at this latter time the restraining order was made by the judge; and this brings up the other and more difficult question—the effect of this order upon the plaintiff's right to levy.

3. If, before the petition of insolvency had been filed, the

lien of this plaintiff had attached, the insolvent proceedings would not, under the statute, have divested it. But we have seen that no lien had attached until after the filing of the petition and the granting of the restraining order. By section 5 of the insolvent act (Wood's Dig. 496), it is provided that the judge receiving the petition of the insolvent shall make an order requiring the creditors of the insolvent to appear, and show cause why the assignment of the insolvent's estate should not be made, and he discharged, etc.; and by the eighth section, "the judge shall direct the clerk to issue the notice calling the creditors together," etc. By section 9: "When issuing the order for the meeting of the creditors, the judge shall order that all proceedings against the debtor be stayed." It is observable that this statute contemplates the double purpose of discharging the debtor and of distributing his assets among his creditors. He is allowed, too, by the statute, a provision out of the property. The court having jurisdiction of this subject has control over the estate as a portion of the subject of its litigation.

The whole property of the bankrupt may be considered as in its custody and within its control. The proceeding, at least in its preliminary stages, is more in the nature of a proceeding *in rem* than *in personam*. The order in the statute mentioned is not like a special restraining order or injunction between litigants, the effect of which depends on its service. The effect of this order is from the making of it, and like every other order made by a court over a subject as to which it has acquired jurisdiction. No notice was necessary, therefore, to the sheriff or the creditor, to give it effect. The petition and the schedule filed was a transfer to the court of judicial control and dominion of this property; and after that transfer, the creditor could not seize or interfere with it—certainly not after the making of the order restraining these proceedings. If this were not so, these proceedings might be made the means of the greatest frauds, and the statute would wholly fail of its purpose of distributing the insolvent's property, and the construction would defeat the power to allot anything to the petitioner; for if the personal service were necessary to give effect to the order, a creditor, or a few creditors, might keep out of the way of service and have the others restrained by service, and then those not served might come in and sweep all of the property. It was contemplated that the effect of the application should have relation from the filing of the petition; but this would be impossible if all the creditors had to be served

with this restraining order, and until service, the effect of it be postponed. We think, then, that the creditor had no right to levy after the granting of this order; but that the property was protected from his levy, and afterwards vested in the assignee, who took, by relation, from the time of the filing of the schedule and petition.

This renders it unnecessary to consider the question of the sufficiency of the notice.

Judgment affirmed.

COPE, J., concurred.

IN ORDER TO SECURE ANY ADDITIONAL RIGHTS TO ATTACHING CREDITOR, it is not sufficient that the attachment should have been issued by a competent authority, or even placed in the hands of an officer, but it must have been actually levied upon the property of the debtor: Note to *Franklin Bank v. Bachelder*, 39 Am. Dec. 607, where the subject is discussed at length.

LEVY OF ATTACHMENT, HOW EFFECTED.—This subject is discussed in note to *Hollister v. Goodale*, 21 Am. Dec. 677, where the principal case is cited, with a large number of others of similar import.

LEVY OF ATTACHMENT IS INCOMPLETE WITHOUT ACTUAL SEIZURE or some other equivalent act of universal notoriety: *State v. Poor*, 34 Am. Dec. 397; *Mills v. Camp*, 36 Id. 488; *Nichols v. Patten*, Id. 713; *Chadbourn v. Sumner*, 41 Id. 720; *Heard v. Fairbanks*, 38 Id. 394; *State v. Poor*, 34 Id. 387; *Shepherd v. Butterfield*, 50 Id. 796, and notes.

PROPERTY OF APPLICANT FOR BENEFIT OF INSOLVENT LAW is in custody of law for the benefit of his creditors: *Buckey v. Snouffer*, 69 Am. Dec. 129.

MORRIS v. MORRIS.

[14 CALIFORNIA, 76.]

CRUELTY WITHIN MEANING OF DIVORCE LAW may be defined to be any conduct in one of the married persons which furnishes reasonable apprehension that the continuance of the cohabitation will be attended with bodily harm to the other.

COURTS GRANT DIVORCES FOR CRUELTY, NOT SO MUCH TO PUNISH OFFENSES already committed as to relieve the complaining party from an apprehended danger.

CRUELTY AS GROUND FOR DIVORCE.—If an act is such as to create a reasonable apprehension that the continuance of cohabitation would be attended with bodily harm, it will justify a divorce, even in the absence of any proof of actual violence. The effect of an act of alleged cruelty is the criterion by which it must be tested.

ACTUAL VIOLENCE AS CRUELTY.—When actual violence has been exercised by one married person towards the other, it is well settled that such violence, to authorize a divorce, must be attended with danger to life, limb, or health, or be such as to cause reasonable apprehension of future danger.

ACTION for divorce, upon the ground of extreme cruelty. Judgment was entered for defendant, and plaintiff takes this appeal.

Yale, for the appellant.

Shattuck, Spencer, and Reichert, for the respondent.

By Court, COPE, J. This is an action for divorce, on the ground of extreme cruelty.

It appears that the parties were married in Philadelphia, on the twenty-eighth of December, 1849, and came to this state in the month of November, 1852, where they resided and cohabited as husband and wife until their separation in January, 1857. There is some evidence showing that the marriage was never productive of much happiness to either of the parties. The plaintiff, if her own declarations are to be relied on, was an unwilling party to its consummation, and sacrificed her own feelings to the authority of her mother. It could hardly have been expected that much happiness would result from a marriage thus contracted. The testimony relative to the conduct of the defendant towards the plaintiff, prior to the occurrences which led to their separation, is conflicting and unsatisfactory. It is not alleged that any act of personal violence was ever committed or attempted; and it does not appear that the plaintiff at any time expressed or entertained apprehension of personal danger. The most that can be claimed as the result of the evidence on this point is, that the defendant, in his intercourse with the plaintiff, did not exhibit that regard for her which was due from him as her husband, and which their relative situations should have inspired.

In our opinion, the case of the plaintiff must stand or fall upon the fact of the violence to her person, committed on the day preceding the separation, and its immediate attendant circumstances, and can derive no support from the previous or subsequent conduct of the defendant. The allegation of the complaint, that the plaintiff¹ was forced from her home by the defendant, and compelled to seek a refuge elsewhere, is not sustained by the evidence. At the moment of leaving she declared to a female acquaintance that she would even then forego her purpose and remain, if he would express any sorrow or regret for what he had done. Why this declaration if she was compelled to go? Does it not show conclusively that her going was a voluntary act, and not the result of any force or coercion whatever? A few days after, she returned, with the consent of her

husband, to the very home from which she alleges she was driven. The circumstances, taken together, are irreconcilable with any other conclusion than that her act in leaving was entirely voluntary, induced, no doubt, by the violence of the preceding day, but without any immediate force or coercion, or any apprehension of future danger.

This brings us to the question whether the violence committed upon the person of the plaintiff, on the day preceding the separation, and the immediate attendant circumstances of such violence, constitute the offense of extreme cruelty within the meaning of our statute. For the purpose of solving this question, we will admit the allegations of the complaint to be true. The specific charge is, that the defendant laid violent hands on the plaintiff, seized her by the throat, and choked and maltreated her in such a manner as to leave on her person visible marks of his cruelty.

It is not alleged in the complaint, nor does it appear in the evidence, that the violence committed was such as to endanger life, limb, or health, or to cause a reasonable apprehension of such danger. We construe the expression "extreme cruelty," as used in our statute, to mean the same thing as the *sævitia*, or cruelty, of the English ecclesiastical courts, and the offense may be defined, in general terms, to be any conduct, in one of the married parties, which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other.

Courts do not interfere in these cases so much to punish an offense already committed as to relieve the complaining party from an apprehended danger: Bishop on Mar. & Div., sec. 456. The effect of an act of alleged cruelty is the criterion by which it must be tested. If the act is such as to create a reasonable apprehension that a continuance of the cohabitation would be attended with bodily harm, it will justify a divorce, even in the absence of any proof of actual violence. But when, as in the present case, actual violence has been committed, the authorities agree that such violence, to authorize a divorce, must be attended with danger to life, limb, or health, or be such as to cause reasonable apprehension of future danger.

Lord Stowell, in the case of *Evans v. Evans*, 1 Hag. Con. 35, in speaking of what constitutes legal cruelty, says: "In the present case, it is hardly necessary for me to define it, because the facts here complained of are such as to fall within the strictest definition of cruelty; they affect not only the comfort,

but they affect the health, and even the life, of the party. I shall therefore decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute impossibility that the duties of married life can be discharged."

In the case of *Barrere v. Barrere*, 4 Johns. Ch. 187, Chancellor Kent uses the following language: "Though a personal assault and battery, or a just apprehension of bodily hurt, may be ground for this species of divorce, yet it must be obvious to every man of reflection that much caution and discrimination ought to be used on this subject. The slightest assault or touch in anger would not, surely, in ordinary cases, justify such a grave and momentous decision." He refers, with approbation, to the language of Pothier, that a blow or stroke of the hand would not be a cause of separation, under all circumstances, unless it was often repeated. The judge ought to consider if it was for no cause, or for a trivial one, that the husband was led to this excess, or if it was the result of provoking language on the part of the wife, pushing his patience to extremity.

He ought, also, to consider whether the violence was a solitary instance, and the parties had previously lived in harmony. *Finley v. Finley*, 9 Dana, 52 [33 Am. Dec. 528], presents several points of similarity to the case at bar. It was a suit for alimony, upon the charge of "cruel, inhuman, and barbarous treatment." It was shown that the previous intercourse of the parties had not been of a very agreeable character, that a single act of personal violence had been committed by the husband, and that a separation immediately ensued. The chancellor decreed an allowance to the wife, but on appeal the decree was reversed, and the bill dismissed. Judge Ewing, in delivering the opinion of the court, said: "Upon the whole, we can regard the affair in no other light than as a sudden freak of passion on both sides, in which no serious injury was done, and which should have been passed by and forgotten with the moment, and furnished no sufficient ground to justify a dissolution of the sacred connection of man and wife."

A further citation of authorities would be useless labor. It is clear that the plaintiff failed to establish her right to the relief prayed for in the complaint. Even if her own conduct furnished no excuse or apology for the violence used, still, as

the first and only act in a married experience of more than eight years, resulting in no serious injury, and creating, as we think, no reasonable apprehension of future danger, such violence certainly affords no rational cause for a divorce.

In addition to all this, it is our opinion that the conduct of the plaintiff was not free from blame. Our conclusion, from the evidence, is, that the cause of complaint originated in a mutual quarrel, in which violence was resorted to by both parties. Which of them committed the first act does not appear, but the circumstances satisfy us that the conduct of the defendant was induced by some provocation received at the hands of the plaintiff, and while under the influence of strong and ungovernable passion caused by such provocation.

Judgment affirmed.

BALDWIN, J., concurred.

CRUELTY AS GROUND FOR DIVORCE DEFINED.—Cruelty is very generally, if not universally, regarded as a high offense against the matrimonial relation. It was so regarded and relieved against by both the civil and ecclesiastical law, and this principle probably pervades all systems of laws in all countries: 1 Bishop on Mar. & Div., sec. 717. It has been a fruitful source of legal discussion, and the subject in all its bearings has been treated of at length by many able minds; yet from all the cases, it is hard to formulate an accurate definition of the term "cruelty" as used in the divorce law. The courts content themselves in each case with determining whether the facts of that particular case constitute cruel treatment, and adjudicating accordingly. Mr. Bishop, in the first edition of his work on marriage and divorce, gives us the following: "Cruelty is any conduct in one of the married parties which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other." Sec. 454. In the succeeding editions of his work he has changed the wording of this definition, so that in the last edition (sixth) it now reads: "Cruelty is such conduct in one of the married parties as, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom." The leading case upon the question of cruelty as a ground for divorce is *Evans v. Evans*, 1 Hag. Con. 35; 4 Eng. Ecc. 310; and a somewhat lengthy excerpt from it could not be more timely than now, while discussing the meaning of the term. The learned Sir William Scott says: "That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, What is cruelty? In the present case, it is hardly necessary for me to define it, because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health, and even the life, of the party. I shall decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in com-

mencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of *per quod consortium amittitur* is but an inadequate test; for it still remains to be inquired, what conduct ought to produce that effect? Whether the *consortium* is reasonably lost, and whether the party quitting has not too hastily abandoned the *consortium*. What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offenses in the marriage state, undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties—for it may exist on the one side as well as on the other—the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance, or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is, that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further; they cannot make men virtuous, and as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

“Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation, for the court has no scale of sensibilities by which it can gauge the *quantum* of injury done and felt; and therefore, though the court will not absolutely exclude considerations of that sort, where they are stated merely as matters of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed; of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number among its necessities, is not cruelty. It may, to be sure, be a harsh thing to refuse the use of a carriage or the use of a servant; it may in many cases be extremely unhandsome, extremely disgraceful to the character of the husband; but the ecclesiastical court does not look to such matters; the great ends of marriage may very well be carried on without them, and if people will quarrel about such matters, and which they certainly may do in many cases with a great deal of acrimony, and sometimes with much reason, they yet must decide such matters as well as they can in their own domestic forum. These are the negative descriptions of cruelty; they show only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever, from Clarke and the other books of practice, is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because

assuredly the court is not to wait till the hurt is actually done; but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not causes of legal relief; people must relieve themselves as well as they can by prudent resistance—by calling in the succors of religion and the consolation of friends—but the aid of courts is not to be resorted to in such cases without any effect.” The principles announced in this case underlie the whole system of law upon this question, and its spirit will pervade all our observations in this note. In accordance with the views expressed in this case, it is the settled rule in England that to constitute such cruelty as would justify the court in decreeing a divorce, there must be either actual violence committed, attended with danger to life, limb, or health, or there must be a reasonable apprehension of such violence. As has been aptly said by the judge, ordinary “danger of life, limb, or health has continued in substance the rule upon which the courts have acted. The phrase has sometimes been varied; Sir John Nicholl has used the expression ‘injury to person or to health,’ which I am inclined to take in conjunction with Lord Stowell’s expression, for there might be a great deal of suffering and brutal usage without coming strictly within the terms of the latter. There must, however, be bodily hurt—not trifling or temporary pain—or a reasonable apprehension of bodily hurt:” *Tomkins v. Tomkins*, 1 Swab. & T. 168. Again, in *Hudson v. Hudson*, 3 Id. 314–317, it is said: “But one feature stands prominent in most, if not in all, the decided cases—personal violence, or the threat of it, and danger to health or life as the result of it.” The same views are held in *Lockwood v. Lockwood*, 2 Curt. Ecc. 281; 7 Eng. Ecc. 114; *Harris v. Harris*, 2 Phillim. 111; 1 Eng. Ecc. 204; *Westmeath v. Westmeath*, 2 Hag. Ecc. Supp. 1; 4 Eng. Ecc. 238–271; *Kenrick v. Kenrick*, 4 Hag. Ecc. 114–129; *Dysart v. Dysart*, 1 Rob. Ecc. 470–533; *Curtis v. Curtis*, 1 Swab. & T. 192; *D’Aguilar v. D’Aguilar*, 1 Hag. Ecc. 773; 3 Eng. Ecc. 329; *Smallwood v. Smallwood*, 2 Swab. & T. 397; *Holden v. Holden*, 1 Hag. Con. 453; 4 Eng. Ecc. 452.

In this country, we have not now, nor have we ever had, any ecclesiastical courts, and the only divorce jurisdiction which our courts possess is such as has been conferred upon them by statute: Bishop on Mar. & Div., sec. 71.

The statutory provisions giving the courts of our different states jurisdiction to grant divorces for cruelty (among other causes) will be found collected under appropriate headings in the note to *Hamaker v. Hamaker*, 65 Am. Dec. 706 et seq. The wording of these different statutes will be found somewhat dissimilar. In some cases, the simple expression “extreme cruelty” has been used in the statute; in others, the designation of the conduct from which the court will rescue an unhappy consort is much elaborated. The construction of these variously expressed statutes has been practically uniform, and, except in a few states where the rule has been relaxed, in harmony with the doctrine of the English ecclesiastical courts; the courts of the different states holding that under their statute the cruelty which would warrant them in interfering and dissolving the marriage contract was such cruelty as would authorize a divorce from bed and board in England under the rule as laid down in the cases above cited. Accordingly, we find Judge Peck laying down the law as follows: To authorize a dissolution of the bonds of matrimony, “there must be, on the part of the husband, actual violence committed on the person of the wife, attended with danger to her life or health, or such conduct on his part as shows there is reasonable apprehension of such vio-

lence:" *Hughes v. Hughes*, 44 Ala. 698. Mr. Chief Justice Warner says: "Legal cruelty may be defined to be such conduct on the part of the husband as will endanger the life, limb, or health of the wife, or create a reasonable apprehension of bodily hurt." Again he says: "The acts of cruelty must be such as to render cohabitation unsafe, or are likely to be attended with injury to the person or to the health of the wife:" *Odom v. Odom*, 36 Ga. 286-317. To the same effect are *Close v. Close*, 24 N. J. Eq. 338; S. C., 25 Id. 526; *Latham v. Latham*, 30 Gratt. 307; *Gibbs v. Gibbs*, 18 Kan. 419; *Perry v. Perry*, 2 Paige, 501; *Whispell v. Whispell*, 4 Barb. 217; *Butler v. Butler*, 1 Parsons, 329; *Smedley v. Smedley*, 30 Ala. 714; *Richards v. Richards*, 1 Grant Cas. 389; *Cole v. Cole*, 23 Iowa, 433; *Powelson v. Powelson*, 22 Cal. 358; *Davies v. Davies*, 55 Barb. 130; *Ford v. Ford*, 104 Mass. 198; *Henderson v. Henderson*, 88 Ill. 248; *Lyster v. Lyster*, 11 Mass. 328; *Moyler v. Moyler*, 11 Ala. 620; *Small v. Small*, 57 Ind. 568; *Finley v. Finley*, 9 Dana, 52; *Mason v. Mason*, 1 Edw. Ch. 278; *Coles v. Coles*, 2 Md. Ch. 341; *Daiger v. Daiger*, Id. 335; *Tayman v. Tayman*, Id. 393; *Bowic v. Bowic*, 3 Id. 51; *Gordon v. Gordon*, 48 Pa. St. 226; *Ratts v. Ratts*, 11 Brad. App. 366; *Hughes v. Hughes*, 19 Ala. 307; *Ruckman v. Ruckman*, 58 How. Pr. 278; *Kelly v. Kelly*, 18 Nev. 49.

In Arkansas the court say that under their statute the court has broader jurisdiction in questions of cruelty than the English ecclesiastical courts; and that with them personal indignities, such as rudeness, unmerited reproach, contempt, studied negligence, open insult, and other manifestations of settled hate, when habitual and continuous, causing extreme and undeserved suffering, are sufficient without being attended with bodily harm: *Ross v. Ross*, 9 Ark. 507. The same rule appears to prevail in Missouri: *Bowers v. Bowers*, 19 Mo. 351; Louisiana: *Tourne v. Tourne*, 9 La. 452; Texas: *Sheffield v. Sheffield*, 3 Tex. 79; *Schreck v. Schreck*, 32 Id. 578; Wisconsin: *Freeman v. Freeman*, 31 Wis. 235; and in Michigan: *Whitmore v. Whitmore*, 49 Mich. 417; *Friend v. Friend*, 53 Id. 543. This view of the law is taken by the above courts under the wording of their statutes, which in each case warrants a departure from the English rule. But the supreme court of Kansas, under a statute authorizing a divorce for "extreme cruelty," give a new definition to that term. They say: "It was formerly thought that to constitute extreme cruelty such as would authorize the granting of a divorce, physical violence was necessary; but the modern and better-considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or the wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health or endanger the life of the other, or such as in any other manner endangers the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty' under the statutes, although no physical or personal violence may be inflicted or even threatened:" *Carpenter v. Carpenter*, 30 Kan. 712-744. The same rule is laid down in *Avery v. Avery*, 33 Id. 1. To uphold this definition, the court cite a number of cases, but they do not support it.

ALL CIRCUMSTANCES OF EACH CASE SHOULD BE CONSIDERED. — Having arrived at a definition of the term "cruelty," the next question for the courts is whether the facts of the case presented for their consideration come within its meaning. In determining this question, they are not confined to the examination of one particular act or set of acts. As we will see further on, there are many acts which by themselves are not sufficient to constitute legal

cruelty, although they constitute grave offenses against the married relation. We cannot doubt but that a number of such offenses combined would in all cases constitute the statutory offense. Cruelty in the sense in which the courts hold it proved as a ground of separation or divorce lies in the cumulative ill conduct which the history of the whole married life discloses. This aggregate is made up of those acts of personal violence or degrading conduct which are spoken of in the books as "acts of cruelty," palliated or inflamed, as the case may be, by the respective language, demeanor, and bearing of the parties, and the whole considered in connection with the general treatment which the party complaining may have received. What must be the extent of any injury complained of, or what particular acts will create a reasonable apprehension of personal injury, will depend upon the circumstances of each case. Cruelty is a relative term, and what may be tolerated by one could not be borne by another; the cruelty is judged from its effects, not solely from the means by which these effects are produced: *Westmeath v. Westmeath*, 2 Hag. Ecc. Supp. 1; 4 Eng. Ecc. 238-271; *Evans v. Evans*, 1 Hag. Con. 35; 4 Eng. Ecc. 310; *D'Aguilar v. D'Aguilar*, 1 Hag. Ecc. 773; 3 Eng. Ecc. 329; *Durant v. Durant*, 1 Hag. Ecc. 733; 3 Eng. Ecc. 310; *Swatman v. Swatman*, 4 Swab. & T. 135; *Power v. Power*, Id. 177; *Whispell v. Whispell*, 4 Barb. 217; *Butler v. Butler*, 1 Parsons, 329; *Cook v. Cook*, 11 N. J. Eq. 195; *Kelly v. Kelly*, 18 Nev. 49-57; *Ward v. Ward*, 103 Ill. 477; *Graecen v. Graecen*, 16 N. J. Eq. 459; *David v. David*, 27 Ala. 222; *Odom v. Odom*, 36 Ga. 286-317.

Station in Life may be Considered. That the court will take into consideration the refinement, education, and position in society of the parties, in order to judge of their acts, is but a special statement of the rule that they will consider all the circumstances of each case. In *Evans v. Evans*, 1 Hag. Con. 35, 4 Eng. Ecc. 310, Sir William Scott says: "Still less is it cruelty where it wounds, not the natural feelings, but the acquired feelings arising from particular rank and situation; for the court has no scale of sensibilities by which it can gauge the *quantum* of injury done and felt; and therefore, though the court will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed." In *Westmeath v. Westmeath*, 2 Hag. Supp. 1, 4 Eng. Ecc. 271, it is said: "A blow between parties in the lower conditions and in the highest stations of life bear a very different aspect. Among the lower classes, blows sometimes pass between married couples who, in the main, are very happy, and have no desire to part; amidst very coarse habits such incidents occur almost as freely as rude or reproachful words; a word and a blow go together. Still, even among the very lowest classes, there is generally a feeling of something unmanly in striking a woman; but if a gentleman, a person of education, the description of which *emolli* mores, and tends to extinguish ferocity; if a nobleman of high rank and ancient family uses personal violence to his wife, his equal in rank, the choice of his affection, the friend of his bosom, the mother of his offspring, such conduct in such a person carries with it something so degrading to the husband, and so insulting and mortifying to the wife, as to render the injury itself far more severe and insupportable." In *David v. David*, 27 Ala. 225, this question is considered by the court, where they say: "Cruelty is frequently a term of relative meaning. Between persons of education, refinement, and delicacy, the slightest blow in anger might be cruelty; while between persons of a different character and walk in life, blows might occasionally pass without marring, to any great extent, their conjugal relations,

or materially interfering with their happiness." Considerations of this character entered into the decision of *Taylor v. Taylor*, 76 N. C. 438; *Odom v. Odom*, 36 Ga. 317; and in *Kline v. Kline*, 50 Mich. 438, where the court lay down the rule that in proceedings for divorce for such causes as drunkenness and cruelty between parties who are unrefined, their ways of life and habits of speech ought not to be tried by the standard of cultivated people, but that their case should be judged by the rules which respectable people of the same condition in life would spontaneously recognize. But in *Whispell v. Whispell*, 4 Barb. 220, the court say: "It is said his grossly indecent language, spoken to and of his wife, is to find palliation, if not excuse, in the fact that the parties moved in a circle of society less refined than others who have enjoyed the advantages of a more cultivated society. But I deny the application of the rule to a case like this. The decencies of life belong equally to all classes; and in none are they more carefully cultivated, and more faithfully observed, than among the respectable farmers of our country. The human heart is the same in all grades of society. From it flows, in the humblest as well as in the highest walk of life, the same current of affection that surrounds the domestic hearth with gentle conduct and kind influences. Delicacy of feeling belongs as well to the cottage as to the statelier mansion. The mind may be cultivated by study, and the manners polished by refined association; but the natural affections of the heart are rarely improved by contact with the world. In their native purity, they recoil at any exhibition of indecency, either in word or deed. Want of cultivation may excuse an unrefined or even coarse expression, but it forms not the slightest apology for indecent conduct or obscene language."

MOTIVE IN INFLICTING CRUELTY IMMATERIAL.—The test by which acts of alleged cruelty are to be judged being whether or not they were dangerous to life, limb, or health, or created a reasonable apprehension of such danger, the motive which incited the commission of the acts is immaterial. They may have been the promptings of an unloving and malignant heart, the impulses of a debased and brutal nature; or they may have been occasioned by a mad jealousy which sprung from an excessive love and devotion. In speaking of misconduct arising from jealousy, the court in *Kirkham v. Kirkham*, 1 Hag. Con. 409, 4 Eng. Ecc. 438, say that "jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual. If that safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone." So in *Westmeath v. Westmeath*, 4 Hag. Ecc. Supp. 1, 4 Eng. Ecc. 238, 271, it is said: "It is not necessary to inquire from what motive such treatment proceeds. It may be from turbulent passion, or sometimes from causes not inconsistent with affection. If bitter waters are flowing, it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own control as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated." The same is the law of *Holden v. Holden*, 1 Hag. Con. 453; 4 Eng. Ecc. 452.

DIVORCE IS GRANTED FOR PROTECTION, NOT AS PUNISHMENT. Courts interfere to grant divorces for cruelty, not so much as a punishment for an offense already committed as to relieve the complainant from an apprehended danger; punishment for past misconduct may enter into the judgment, but the divorce is granted mainly as a protection against future probable acts of cruelty; this probability being based upon the former conduct, and the char-

acter and disposition of the parties. "The proceeding is in effect *quia timet*. It is for safety in the future, not retribution in the past:" Bishop on Mar. & Div., sec. 719; *English v. English*, 27 N. J. Eq. 579, 585; *Cook v. Cook*, 11 Id. 195. All these cases recognize this principle.

EXECUTION OF THREATS OF VIOLENCE IS NEVER NECESSARY. We have seen that a reasonable apprehension of injury to life, limb, or health is sufficient to constitute cruelty within the meaning of the law. This apprehension may arise from a variety of acts; among which are violent demonstrations, or threats of injury. Passionate words do not break bones; but words of menace, importing actual danger of bodily harm, will, of course, excite this apprehension, and the courts will interfere without waiting for an actual execution of the threats. Words of menace alone, without any attempt at their execution, will be sufficient, if they be of such a character, and accompanied by such circumstances, as to justify a belief in their seriousness; they must impress the person to whom they are addressed, not as idle words, not as a form of intemperate expression, but as importing action, and in that sense conveying the reality of a threat of bodily harm: *Oliver v. Oliver*, 1 Hag. Con. 361; 4 Eng. Ecc. 430; *Popkin v. Popkin*, 3 Eng. Ecc. 325, note; *Otway v. Otway*, 2 Phillim. 95; 1 Eng. Ecc. 201; *Kirkman v. Kirkman*, 1 Hag. Con. 409; 4 Eng. Ecc. 438; *Kennedy v. Kennedy*, 73 N. Y. 369; *Harratt v. Harratt*, 7 N. H. 196; S. C., 26 Am. Dec. 730; *Smedley v. Smedley*, 30 Ala. 714; *Cole v. Cole*, 23 Iowa, 433; *Davies v. Davies*, 55 Barb. 130; *Black v. Black*, 30 N. J. Eq. 215; *Mason v. Mason*, 1 Edw. Ch. 278; *Ruckman v. Ruckman*, 58 How. Pr. 278; *Cook v. Cook*, 11 N. J. Eq. 197; *Kennedy v. Kennedy*, 60 How. Pr. 151; *Breinig v. Meitzler*, 23 Pa. St. 156; *Graecen v. Graecen*, 16 N. J. Eq. 459; *Freeman v. Freeman*, 31 Wis. 235; *Sackrider v. Sackrider*, 60 Iowa, 397; *Wheeler v. Wheeler*, 53 Id. 511.

Threats need not be Addressed Directly to Complainant. Threats to injure the person of the wife need not be addressed directly to her; they may be made to third persons; but must, of course, be communicated to her. The fact that such threats excited feelings of apprehension in the minds of third persons is a circumstance showing that the wife was not unreasonably alarmed: Bishop on Mar. & Div., sec. 730; *D'Aguilar v. D'Aguilar*, 1 Hag. Ecc. 773; 3 Eng. Ecc. 329; *Hollister v. Hollister*, 6 Pa. St. 449-453.

APPREHENDED HARM MUST BE BODILY, NOT MENTAL. That the injury feared from a continuation of the matrimonial relation must be physical injury, and not injury to the mind or to the feelings, is an inevitable result of an adoption of the definition we have above given it. The cases so hold: *Oliver v. Oliver*, 1 Hag. Con. 361; 4 Eng. Ecc. 429; *Evans v. Evans*, 2 Hag. Ecc. 35; 4 Eng. Ecc. 310; *Horwood v. Horwood*, 3 Taunt. 421; *Powelson v. Powelson*, 22 Cal. 360; *Richards v. Richards*, 1 Grant Cas. 389; *Henderson v. Henderson*, 88 Ill. 248. This idea dominates all the cases.

Acts Occasioning Mental Suffering.—It is admitted that mental suffering may be very acute; that anguish of mind may be more unbearable than physical torture. "There are other sufferings not less intense than those occasioned by bodily wounds. Angry words, coarse and abusive language, grossly intemperate habits, might bring greater sufferings upon a refined and delicate woman than a single act of violence upon her person, and might well, in the reasonable judgment of the public, authorize her withdrawing from the society of her husband:" *Pidge v. Pidge*, 3 Met. 257-261. But the conduct of a husband, however productive of such mental suffering, does not constitute legal cruelty. In the case just cited, the court continue: "But the legislature has annexed no such penalty as a divorce from the bond of matrimony for

causes like those just enumerated." This is so, because of the inability of the court to judge of the extent of suffering occasioned in any case. As is said in *Cheatham v. Cheatham*, 10 Mo. 296: "If mere words will constitute the indignities to the person mentioned by the statute, by what standard of refinement shall the offended sensibilities of the female be estimated? Natural temperament, education, and the associations of life will very much vary the degrees of unhappiness and discomfort which reproaches of this character would be likely to produce." The same objection is raised in *Evans v. Evans*, *supra*. In speaking of conduct on the part of one married person imposing mental suffering upon the other, the court, in *Thornberry v. Thornberry*, 2 J. J. Marsh. 322, say: "Without intending to say that such treatment on the part of a husband towards his wife is not as cruel, inhuman, and barbarous in its moral aspect as personal violence would be, we are constrained to say that this is not the kind of danger to the life of the wife against which the legislature intended to guard. On the contrary, we conceive it must be some injury to the body, intended or inflicted, which will endanger life, to justify a divorce. We cannot with sufficient certainty ascertain the operation of particular acts upon the mind, and then trace the influences of the mind upon the body, in producing disease and death, to begin investigations of the kind without positive command by legislative authority." Mr. Bishop strongly condemns these views as unsound: Bishop on Mar. & Div., sec. 725; and the California court intimate a belief in his reasoning: *Powelson v. Powelson*, 22 Cal. 360.

Injury to Health is Cruelty. Under our definition, that acts which in fact or to the reasonable apprehension of complainant endangered her life, limb, or health, it savors somewhat of a repetition to state that when the husband does acts which injuriously affect or endanger the health of his wife, he is guilty of cruelty. But this has been directly decided by the courts in a number of cases, and we here give them: *Cole v. Cole*, 23 Iowa, 433; *Wheeler v. Wheeler*, 53 Id. 511-516; *Powelson v. Powelson*, 22 Cal. 358; *Carpenter v. Carpenter*, 30 Kan. 712-744; *Thornberry v. Thornberry*, 2 J. J. Marsh. 323; *Ruckman v. Ruckman*, 58 How. Pr. 278; *Kelly v. Kelly*, 18 Nev. 57; *Caruthers v. Caruthers*, 13 Iowa, 266; *Sharp v. Sharp*, 16 Brad. App. 348. This is so under the Iowa statute, which provides that the cruelty must be of such a character as to endanger life. The courts argue that to do an act involving, to its injury, the health of a party, is of necessity to endanger his life: Iowa cases, *supra*.

CHARACTER OF ACTS CHARGED MUST BE GRAVE AND WEIGHTY. The causes which will authorize a court to interfere and dissolve a matrimonial alliance must be grave and weighty. The parties to a marriage will not be released from the duties and responsibilities of that relation merely because there may be some want of congeniality in their tempers and dispositions; they take each other "for better or for worse," and if subsequently incompatibility of temperament is developed and dissensions invade their home, they must try to quell them by the weapons of civility and kindness, and if they fail (as unfortunately they often do), the law requires that they should submit to the misfortune as one of the consequences of their own injudicious choice. When people understand that they must live together, except in the few grave cases where the law interferes, they learn to soften by mutual accommodations, that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes upon us. In view of the effects which a divorce entails upon the parties, their offspring, and society, it seems to be the policy of the law to

require that the individual misery produced by unhappy matches, and the inhumanity of brutal husbands and unfaithful wives, had better be endured than to allow the bonds to be dissolved, unless for grave and weighty reasons: *Evans v. Evans*, 1 Hag. Con. 35; 4 Eng. Ecc. 310; *Oliver v. Oliver*, 1 Hag. Con. 361; 4 Eng. Ecc. 429; *Kennedy v. Kennedy*, 60 How. Pr. 151; *Rickards v. Rickards*, 9 Or. 168; *Schindel v. Schindel*, 12 Md. 294; *Childs v. Childs*, 49 Id. 509; *Rayner v. Rayner*, 49 Mich. 600; *Shell v. Shell*, 2 Sneed, 716. This is the rule of all the cases, but its operation will be particularly observable in the next subdivision, where it will be found repeatedly announced, and universally observed.

UNKIND TREATMENT, BAD TEMPER, NEGLECT, INSULT, BRUTAL REMARKS, OBSCENE AND INDECENT LANGUAGE, ETC., INSUFFICIENT.—We have seen that the criterion according to which the courts determine whether the facts presented by complainant constitute cruel treatment is, do the acts charged injure or endanger life, limb, or health? or create a reasonable apprehension of such injury? Unless they do, cruelty is not established. The courts have shown a tendency to keep this rule very strict, and we have also seen that to justify the court in interfering, the cause must be grave and weighty, and show such a state of personal danger as would prevent the discharge of the duties of married life. In conformity with the requirements of these two rules, the one of law, the other of public policy, the decisions are practically unanimous in holding that such offenses against the marriage relation as austerity of temper, petulance of manners, rudeness of language, a want of civil attention, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to that cruelty against which the law will relieve. Nor will a wife be divorced from a husband who is rude and dictatorial in his speech, exacting in his demands, or unkind and negligent in his treatment of her when she is sick, or worn and weary. Where such conduct alone is practiced, the wife must bear up under it—must, if possible, subdue it by decent restraint or by prudent conciliation, or silently suffer it as one of the consequences of an injudicious connection: *Evans v. Evans*, 1 Hag. Con. 35; 4 Eng. Ecc. 310; *Harris v. Harris*, 2 Phillim. 111; 1 Eng. Ecc. 204; *Kenrick v. Kenrick*, 4 Eng. Ecc. 114–129; *Oliver v. Oliver*, 1 Hag. Con. 361; 4 Eng. Ecc. 430; *Kirkman v. Kirkman*, 1 Hag. Con. 409; 4 Eng. Ecc. 438; *Davies v. Davies*, 55 Barb. 130; *Henderson v. Henderson*, 88 Ill. 248; *Pillar v. Pillar*, 22 Wis. 658; *Moyler v. Moyler*, 11 Ala. 620; *Finley v. Finley*, 9 Dana, 52; *Shaw v. Shaw*, 17 Conn. 189; *Coles v. Coles*, 2 Md. Ch. 341; *Daiger v. Daiger*, 2 Id. 335; *Bowic v. Bowic*, 3 Id. 51; *Gordon v. Gordon*, 48 Pa. St. 226; *Bogges v. Bogges*, 4 Dana, 308; *Kenley v. Kenley*, 2 How. (Miss.) 751; *Ruckman v. Ruckman*, 58 How. Pr. 278; *Johns v. Johns*, 57 Miss. 530; *Shell v. Shell*, 2 Sneed, 716; *Breinig v. Meitzler*, 23 Pa. St. 160; *Childs v. Childs*, 49 Md. 509; *Carr v. Carr*, 22 Gratt. 168; *Beall v. Beall*, 80 Ky. 675–680; *Boeck v. Boeck*, 16 Neb. 196. This is even so under the Texas statute, which is a little broader than the rule generally followed: *Scott v. Scott*, 61 Tex. 119. In this case, Chief Justice Willie naively remarked that a man assumes the risk when he marries that his wife may not love him, and the fact that she uses language in addressing him which, to say the least, is not the language of love, does not entitle him to a divorce.

Divorces will not be granted for indulgence in passion, for abusive language, threats of violence where the safety of the person is not in peril, or the words are not likely to be followed by acts producing serious injury; nor for inhuman, coarse, and brutal treatment, grossly improper language, foul terms, and vile epithets: *Saunders v. Saunders*, 10 Jur. 144; *Sweatman v. Sweatman*,

4 Swab. & T. 135; *Knight v. Knight*, Id. 103; *Dysart v. Dysart*, 1 Rob. Ecc. 106, 117, 121; *Coursey v. Coursey*, 60 Ill. 186; *Close v. Close*, 24 N. J. Eq. 338; S. C., 25 Id. 526; *Latham v. Latham*, 30 Gratt. 307; *Whispell v. Whispell*, 4 Barb. 217; *Butler v. Butler*, 1 Parsons, 329; *Everton v. Everton*, 5 Jones L. 202; *Farnham v. Farnham*, 73 Ill. 497; *Day v. Day*, 56 N. H. 316; *Thomas v. Thomas*, 20 N. J. Eq. 97; *Gleason v. Gleason*, 16 Neb. 15. But while the courts hold that mere language, however outrageous, does not constitute cruelty, evidence of such conduct is always admitted. An aggravated case of studied insult and neglect, of vile epithet, and indecent and obscene language, standing alone, is almost sufficient; and the courts require very little foundation of physical violence, or the fear of it, to induce them to grant a divorce. The use of such language, while not cruelty in itself, will induce the court more readily to believe evidence as to personal violence, and would show a strong probability that such violence would be repeated; for its use would show a total want of self-command, a depraved mind, and an absence of all controlling principle: See cases above; also *Dysart v. Dysart*, 1 Rob. Ecc. 106, 117, 121; *Pillar v. Pillar*, 22 Wis. 658. In Michigan, an extreme case of such conduct as is above outlined is alone sufficient to constitute cruelty: *Goodman v. Goodman*, 26 Mich. 417.

DRUNKENNESS AS CRUELTY.—Drunkenness, although long continued and excessive, is not of itself such cruelty as will constitute ground for divorce. It may entail upon the wife much misery, and a life-long trial of patience, and fruitless hope, but if unaccompanied by real or apprehended physical injury it is insufficient; the court will not unsettle the law, or depart from the decided cases, to indulge its feelings or to sympathize with a petitioner's misfortunes: *Hudson v. Hudson*, 3 Swab. & T. 314; *Brown v. Brown*, L. R. 1 P. & D. 46; *Waskam v. Waskam*, 31 Miss. 154; *Haskell v. Haskell*, 54 Cal. 262. Evidence of drunkenness may be considered in connection with evidence of personal violence, or threats, however: *Coursey v. Coursey*, 60 Ill. 186. And acts which the law recognizes as cruel lose none of their force or effect because of having been performed while drunk. Where a drunken husband inflicts upon his wife physical injuries endangering her life, limb, or health, or his conduct is such as to justify a reasonable belief that he will do so, she is entitled to a divorce: *Marsh v. Marsh*, 1 Swab. & T. 312; *Power v. Power*, 4 Id. 173; *Waddell v. Waddell*, 2 Id. 584; *Mason v. Mason*, 1 Edw. Ch. 278; *Bowie v. Bowie*, 3 Md. Ch. 52; *Hughes v. Hughes*, 19 Ala. 307; *Lockridge v. Lockridge*, 3 Dana, 28; S. C., 28 Am. Dec. 52; *Allen v. Allen*, 31 Mo. 479; *Scoggins v. Scoggins*, 85 N. C. 347.

ACTS PERFORMED WHILE INSANE.—Acts which under ordinary circumstances would constitute cruelty within the meaning of the law, when performed by an insane husband or wife are not given that effect: *Hayward v. Hayward*, 1 Swab. & T. 81; *Wertz v. Wertz*, 43 Iowa, 534; *Powell v. Powell*, 18 Kan. 371-378. In this latter case the court say, in speaking of such acts by an insane husband, that as a consequence of his condition he was mentally incapable of knowing what he did. "Under such circumstances, on very familiar principles, he could not be held responsible for his acts, and we do not think the acts thus committed a sufficient cause of divorce." But in New Jersey it is the rule that a wife is as much entitled to protection against extreme cruelty on the part of her husband, where his conduct is the result of insanity, as where it springs from jealousy or hatred: *Smith v. Smith*, 33 N. J. Eq. 458. So in *Curtis v. Curtis*, 1 Swab. & T. 192-213, in speaking of conduct occasioned by an acute disorder, such as brain-fever, it is said that "if the result of such disease has been a new condition

of the brain, rendering the party liable to fits of ungovernable passion which would be dangerous to a wife, then undoubtedly this court is bound to emancipate her from such peril."

UNFOUNDED ACCUSATIONS AGAINST CHASTITY.—An unfounded accusation of adulterous intercourse, or a false and malicious charge of unfaithfulness to marriage vows, has at all times been regarded as one of the gravest offenses against a virtuous wife. Such a charge, when deliberately and causelessly made, is, even by the courts which most strictly observe the technical definition of cruelty, held to be of itself alone almost sufficient to authorize a divorce. It is a circumstance of the greatest aggravation, and when found to exist in connection with the slightest act of physical violence, or apprehension thereof, is always held to constitute legal cruelty: *Durant v. Durant*, 1 Hag. Ecc. 733; 3 Eng. Ecc. 310-327; *Bray v. Bray*, 1 Hag. Ecc. 163; 3 Eng. Ecc. 76; *Otway v. Otway*, 2 Phillim. 95; 1 Eng. Ecc. 200; *Kennedy v. Kennedy*, 73 N. Y. 369; *Sharp v. Sharp*, 2 Sneed, 496; *Cook v. Cook*, 11 N. J. Eq. 195; *De Melchi v. De Melchi*, 67 How. Pr. 20; *Graft v. Graft*, 76 Ind. 136; *Myrick v. Myrick*, 67 Ga. 771; *Farnham v. Farnham*, 73 Ill. 497; *Ward v. Ward*, 103 Id. 477; *Powelson v. Powelson*, 22 Cal. 358. The court in *Kennedy v. Kennedy*, 60 How. Pr. 151, appear to have held such a charge alone sufficient; and so the law appears to be interpreted in Nevada: *Kelly v. Kelly*, 18 Nev. 49. In Missouri, in the case of *Lewis v. Lewis*, 5 Mo. 278, it was held that such a charge, made without just cause, would of itself amount to cruelty; but this doctrine was soon denied by the later case of *Cheatham v. Cheatham*, 10 Id. 296.

In Texas it is well settled that a false and malicious charge of want of chastity constitutes legal cruelty. This is the only exception they allow to the rule that cruelty is such violence as injures life, limb, or health, or such conduct as induces a reasonable fear of such injury: *Jones v. Jones*, 60 Tex. 469; *Scott v. Scott*, 61 Id. 119; *Bahn v. Bahn*, 62 Id. 518. Such charges amount to extreme cruelty in Oregon: *Smith v. Smith*, 8 Or. 101; *McMahan v. McMahan*, 9 Id. 525; and such also appears to be the law in Michigan: *Palmer v. Palmer*, 45 Mich. 150.

SINGLE ACT OF CRUELTY SOMETIMES SUFFICIENT.—Considerable hesitation is shown by the courts to interfering with the marriage contract where but one act of cruelty is established to have been inflicted upon the petitioner. It may have been done in a sudden fit of passion, and the remorse which succeeded it may forever prevent its repetition. It may be the one blot upon a long life of conjugal harmony. The fact that in a number of years of married life but one such offense should have been committed may be, and generally is, a strong circumstance showing that it is not likely to be repeated. But it is only on this supposition that the court forbears to interpose its protection, even in the case of a single act; because if one act should be of that description which should induce the court to think that it is likely to occur again, and to occur with real suffering, there is no rule that will prevent its interference. "It has been laid down that where one gross act of cruelty is of such a nature as to raise a reasonable apprehension of further acts of the same kind, the court will grant relief:" *Reeves v. Reeves*, 3 Swab. & T. 139; *Smallwood v. Smallwood*, 2 Id. 397; *Westmeath v. Westmeath*, 2 Hag. Ecc. Supp. 1; 4 Eng. Ecc. 238-271; *Holden v. Holden*, 1 Hag. Con. 453; 4 Eng. Ecc. 452; *Fleytas v. Pigneguy*, 9 La. 419; *Lauber v. Mast*, 15 La. Ann. 593; *Pillar v. Pillar*, 22 Wis. 658; *Beyer v. Beyer*, 50 Id. 254; *Cook v. Cook*, 11 N. J. Eq. 195; *French v. French*, 4 Mass. 587; *Hoshall v. Hoshall*, 51 Md. 72; *May v. May*, 62 Pa. St. 206. "We think one beating or whipping of a wife by her husband sufficient to establish the charge of extreme cruelty. Such an act could

not be accidental or by mistake; and if not, the probabilities would be that it might be repeated again and again, subjecting the wife to constant fear, and rendering her life miserable. It is extremely cruel for a husband to beat or whip his wife even once:" *Albert v. Albert*, 5 Mont. 577. It is manifest that a single act of cruelty will not authorize a divorce in Illinois, where the statute requires that the cruelty should be "extreme and repeated." But they recognize and follow the above rule as far as this statute will allow, by holding that two acts will, in a proper case, be sufficient: *Sharp v. Sharp*, 16 Brad. App. 348.

CRUELTY, ACTS HELD TO CONSTITUTE.—Whenever acts of violence inflicted by a husband upon his wife injures her life, limb, or health, or whenever his conduct is such as to create a reasonable apprehension of such injury, it amounts to extreme cruelty, otherwise not. When a case is presented to a court for its determination, it becomes its duty to decide, from a consideration of all its circumstances, whether the facts proved come within the meaning of this rule. There are some acts so palpably cruel that it requires no adjudication to give them that definite character. To beat or whip a wife is of course aggravated cruelty: *Westmeath v. Westmeath*, 2 Hag. Ecc. Supp. 1; 4 Eng. Ecc. 238-271; *Albert v. Albert*, 5 Mont. 577; and a push cannot be distinguished from a blow: *Saunders v. Saunders*, 1 Rob. Ecc. 560. Throwing a wife on the floor, and pulling her arms and wrists violently, is legal cruelty: *Dysart v. Dysart*, Id. 470-533. Striking a wife on two occasions was held to be cruel in *Brotherton v. Brotherton*, 12 Neb. 75; and one beating was so held in *Vocacek v. Vocacek*, 16 Id. 453. Throwing a bucket of water on a wife while in bed, accompanied by a threat of further violence if she did not leave the house, is legal cruelty: *Moyler v. Moyler*, 11 Ala. 620. The circumstances of *Payne v. Payne*, 4 Humph. 500, are peculiar, and were held to constitute an aggravated case of cruelty. The husband was in the habit of addressing violent and abusive language to his wife, threatened to drive her from his house, and choked and beat her. But the circumstance upon which the court most dwelled was, that in his daily prayers, before the family altar, and in her presence, he was in the habit of praying God to deliver him from her. A husband who maintains persons in his house against his wife's wishes, who practice cruelty upon her, is responsible for their acts. He makes their cruelty his own: *Hall v. Hall*, 9 Or. 452. Spitting in a wife's face is an act of great cruelty: *D'Aguilar v. D'Aguilar*, 1 Hag. Con. 773; 3 Eng. Ecc. 329-331, note.

Excessive Sexual Indulgence.—The forcing a wife to submit to excessive sexual intercourse may constitute cruelty. "Humanity demands that such complaints be heard. The wife protecting her life from the ungovernable lust of her husband, by seeking a divorce, presents as strong a case for relief under the law, as when she flees from his intolerable cruelty inflicted by brute force:" *Melvin v. Melvin*, 58 N. H. 569.

Communicating Venereal Disease.—A husband who is afflicted with the venereal disease, and deliberately communicates it to his wife, is guilty of extreme cruelty: *Brown v. Brown*, L. R. 1 P. & D. 46; *Collett v. Collett*, 1 Curt. Ecc. 678. At the time he communicates the disease to her it is necessary that he should be aware of his condition, but he will be presumed to have such knowledge until he establishes the contrary: *Popkin v. Popkin*, 3 Eng. Ecc. 325, note; *Brown v. Brown*, L. R. 1 P. & D. 46. But the probable chance of communicating this disease is not sufficient to support a charge of cruelty; there must be proof of the communication of the disease: *Ciucci v. Ciucci*, 26 Eng. L. & Eq. 604.

Adultery as Cruelty.—Adultery, although open and flagrant, does not appear to be, of itself, quite sufficient to constitute legal cruelty. But it is generally regarded as a very grave offense, and when accompanied by very slight evidence of violence, will justify a divorce. In speaking of a very aggravated case, Lord Stowell said: "The attempt to debauch his own women-servants was a strong act of cruelty; perhaps not alone sufficient to divorce, but which might weigh in conjunction with others as an act of considerable indignity and outrage to his wife's feelings. The attempt to make a brothel of his own house was brutal conduct of which the wife had a right to complain:" *Popkin v. Popkin*, 3 Eng. Eco. 325, note. Such conduct is characterized in even stronger terms in *Knight v. Knight*, 4 Swab. & T. 103; *Swatman v. Swatman*, Id. 135. In *McClung v. McClung*, 40 Mich. 498, the virtuous judge says that it "would be hard to conceive of any worse cruelty to a wife who had any sensibility left than such a course of conduct. No assault or bodily injury could make it worse." Several acts of adultery committed by a husband, in the absence of his wife, were treated much more lightly in *Miller v. Miller*, 78 N. C. 102.

Ill Treatment of Child as Cruelty to Mother.—Extreme cruel treatment inflicted upon a child, in the presence of a mother, if done for the purpose of annoying her and giving her pain, appears to constitute cruelty to her, but probably, when standing alone, not sufficient to authorize a divorce: *Bramwell v. Bramwell*, 3 Hag. Eco. 618; 5 Eng. Eco. 232, 242; *Wallcourt v. Wallcourt*, 11 Jur. 134; *Suggate v. Suggate*, 1 Swab. & T. 489; *Everton v. Everton*, 5 Jones L. 202; *Bihin v. Bihin*, 17 Abb. Pr. 19; *Mayhew v. Thayer*, 8 Gray, 172.

PEOPLE v. BALL.

[14 CALIFORNIA, 101.]

DESCRIPTION OF MONEY IN INDICTMENT.—In an indictment for larceny, money should be described as so many pieces current gold or silver coin of the country, of a particular denomination, according to the facts. The species of coin must be specified. A description as "three thousand dollars lawful money of the United States" is not sufficient.

INDICTMENT for larceny. The opinion states the facts.

Edwards, for the appellants.

By Court, COPE, J. The defendant was indicted by the grand jury of Sonoma county. He demurred to the indictment, on the ground that it did not sufficiently describe the property charged to have been stolen. The demurrer was overruled, and he thereupon pleaded not guilty, was tried and convicted. The property is described as "three thousand dollars lawful money of the United States." This description is not sufficient. In an indictment for larceny, money should be described as so many pieces-of the current gold or silver coin of the country, of a particular denomination, according to the facts. "The species

of coin must be specified:" Archb. Crim. Pl. 61; Whart. Crim. L. 132.

In the case of *State v. Longbottoms*, 11 Humph. 39, the supreme court of Tennessee decided that an indictment charging the defendant with stealing "ten thousand dollars, good and lawful money of the state of Tennessee," was bad for want of description.

Judgment reversed, and cause remanded for further proceedings.

BALDWIN, J., concurred.

DESCRIPTION OF MONEY OR BANK BILLS IN INDICTMENT.—"In larceny of silver coins, the general form of charging the offense as a larceny of 'sundry pieces of silver coin, amounting together to the sum of twenty dollars,' without describing each piece of coin, has long been practiced and sanctioned by this court." An indictment for stealing bank bills sufficiently describes them as "sundry bank bills of some banks respectively to the said jurors unknown, of the amount and value in all of thirty-eight dollars, of the property, goods, and chattels" of a person named. It would be difficult for one holding bills or coin for daily use to describe their numbers or denomination: *Commonwealth v. Grimes*, 71 Am. Dec. 666, and note.

THE PRINCIPAL CASE IS CITED and its doctrine somewhat limited in *People v. Green*, 15 Cal. 512, where it is decided that an indictment charging the larceny of a certain number of twenty and ten dollar pieces, giving their total value, is not defective as not averring the value of each particular piece of coin.

CURTIS v. HERRICK.

[14 CALIFORNIA, 117.]

ADMINISTRATOR MAY MAINTAIN EJECTMENT TO RECOVER POSSESSION OF LAND, as the statute gives him a right of possession.

PROOF OF SERVICE OF COMPLAINT.—Where the sheriff's return states that he served the defendant with a certified copy of the complaint, this is sufficient to support a judgment by default. It cannot be argued that this does not show that the copy was certified by the clerk; he being the only person who could legally make the certificate, it must be presumed, in favor of the officer who has the general power of making service, that he discharged his duty in the legal mode.

WHERE ACTION WAS COMMENCED AGAINST DOE, ROE, ETC., BUT SERVICE WAS HAD UPON OTHERS, whose names are indorsed upon the writ, judgment by default may be entered against the latter. After service had upon them in this way, their failure to appear or defend was equivalent to an admission that they were the persons intended to be sued.

WHERE JUDGMENT IS IMPROPERLY ENTERED FOR DAMAGES, SAME MAY BE REMITTED, and the remainder of the judgment stand.

APPEAL from the seventh judicial district. The opinion states the case.

Cornwall, for the appellant.

Shattuck, for the respondent.

By Court, BALDWIN, J. This was an ejectment to recover a tract of land in Sonoma county. Judgment by default was rendered by the court against defendants, from which they appeal. Several points have been made and discussed in the argument, which it is not necessary, in the view which we have taken of the case, to determine.

1. The first objection made by the appellants is, that an administrator cannot sue to recover possession of real estate in this state. But as the statute gives a right of possession to the administrator, it is difficult to see why he cannot maintain a possessory action to recover it. The complaint asserts his title as administrator, and the default confesses it.

2. It is assigned for error that no legal service of a copy of the complaint was made on the defendants. But the return by the sheriff expressly asserts that the officer served the defendants with a certified copy of the complaint. It is argued that this does not show that the copy was certified by the clerk, but this criticism is too technical; as the clerk is the only person who could legally make the certificate, it must be presumed, in favor of the officer who has the general power of making service, that he discharged his duty in the legal mode.

3. It is also assigned that several persons were sued in the writ and complaint by fictitious names, and judgment was taken against other parties who bear different names. But the service is returned as made on the particular defendants by their proper names, as John Doe, *alias* Westfall. It is true, there seems to be no proof that Doe was the same man as Westfall, nor was any necessary. For Westfall, after this service on him in this way, having made no appearance or defense, this was equivalent to an admission that he was the person intended to be sued, and therefore judgment was properly rendered against him.

4. The last assignment of errors is, that in the judgment, damages in a large sum were rendered against each of the defendants, instead of being rendered against all jointly. But an entry appears to have been made by order of the district judge in another action releasing these damages, and the respondents offer to remit them in this court.

The judgment is so modified as to remit these damages, and it is otherwise affirmed at the cost of the appellants.

Ordered accordingly.

COPE, J., concurred.

RIGHT OF ADMINISTRATOR TO MAINTAIN POSSESSORY OR REAL ACTION: See *Smith v. McConnell*, 63 Am. Dec. 340, and note collecting prior cases.

PRESUMPTION IN FAVOR OF RETURN.—Sheriff's return upon writ that he served process upon certain named defendants, and could not find the others, imports that a personal service was made upon those found: *Colerick v. Hyoper*, 56 Am. Dec. 505.

DEFAULT ADMITS CAUSE OF ACTION, AND MATERIAL AND TRAVERSABLE AVERMENTS, but not the amount of damages: *Willson v. Willson*, 57 Am. Dec. 320, and note.

WHERE JUDGMENT IS RENDERED FOR MORE THAN PARTY IS ENTITLED TO RECOVER, the appellate court will correct the error, even where the judgment below was by default: *Gower v. Carter*, 66 Am. Dec. 71.

RYER v. STOCKWELL.

[14 CALIFORNIA, 134.]

IF ACTION TO RECOVER REWARD OFFERED IN ADVERTISEMENT for the arrest and conviction of the one who set fire to a certain house, such conviction having been effected, it cannot be urged that the agreement was a *nude pact*, the services being such as any good citizen is bound to perform. Plaintiff put himself to extraordinary trouble to procure the conviction, which it can hardly be said every good citizen is bound to do.

ADVERTISEMENT OFFERING REWARD IS CONTRACT.—The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal on the part of the person making it to all persons, which any one capable of performing the service may accept at any time before it is revoked and perform the service; and such offer on one side, and acceptance and performance on the other, is a valid contract made on good consideration, which the law will enforce.

IN CASE OF ADVERTISEMENT OFFERING REWARD UNTIL PERFORMANCE, the offer is a proposal merely, and not a contract, and may be revoked at the pleasure of him who made it.

AT WHAT TIME REWARD IS EARNED.—Where a reward is offered for such information as will be sufficient to convict a criminal, a claim to the reward does not attach until the prisoner has been convicted, as the sufficiency of the information can only be determined by the event of the trial. The statute of limitations runs from this time.

ADVERTISEMENT OFFERING REWARD for certain information, upon its being furnished, becomes a written contract, against which the statute does not run for four years.

ACTION to recover a reward. The opinion states the case.

Booker and Bridges, for the appellant.

Baine and Bouldin, for the respondent.

By Court, BALDWIN, J. This action is brought to recover the amount of a certain reward offered by the defendant for information that would lead to the arrest and conviction of the person or persons who set fire to the defendant's house, in the north part of the city of Stockton, on the morning of the eighteenth of June, 1856. This reward was offered by publication in a newspaper. The complaint, after setting out this publication, charges that the plaintiff saw and read the notice, and proceeded on the faith of it to institute inquiries and investigations with regard to the persons who set fire to the house of defendant, and did detect the criminal, and gave information to the proper authorities, to wit, a justice of the peace of the county, and to the district attorney; which information led to the arrest and conviction of one Callahan, on an indictment preferred against him for the crime of arson in the second degree. The prisoner was, in January, 1857, convicted in the district court of San Joaquin. The complaint avers a demand on defendant for the reward on the twenty-fourth of June, 1857, the time of making complaint before the justice, and on the nineteenth day of March, 1859. The suit was brought on the twenty-first of March, 1859. The defendant demurred to this complaint, and the demurrer was sustained. Afterwards the plaintiff amended his complaint by leave, and this pleading was also demurred to; but it is not necessary to notice it, as it presents no new features.

1. The grounds of demurrer were: That this agreement is a *nude pact*, the plaintiff being bound to render the services, as a good citizen, without reward, and therefore cannot claim any, though specially promised it. But this position is not tenable. The defendant had a special interest in procuring this intelligence, and evidently designed to furnish extraordinary inducements to the discovery of the facts; and the complaint alleges that the plaintiff put himself to extraordinary trouble to procure them. It can hardly be said that every citizen is bound, however meritorious the task may be, to quit his own business, and devote his time to the discovery of crime and bringing criminals to justice. Nor that if a man who has lost his property agrees to give another a sum of money to go with him to discover or arrest the thief and recover the goods, he is not bound to pay that other, if the latter performs the service.

2. The next objection is, that this claim is barred by the

statute of limitations. We agree with the counsel for the respondent, that this paper on its face is not a written contract. It lacks mutuality. The plaintiff was no party to it. It is a mere proposition. But it may become a contract. It offers a given compensation for particular services, and invites the rendering of those services. Just as if a man were publicly to advertise that he would give any workman certain wages for doing work on his premises; if a workman, seeing the proposition, should go on and do the work, and especially if the advertiser received the benefit of it, we apprehend that no one would dispute that he could sue and recover. The services would, in such case, be rendered at the instance and by the request of the employer, and he would be responsible for the price. See *Stackpole v. Arnold*, 11 Mass. 31 [6 Am. Dec. 150]; *Trustees of Farmington Academy v. Allen*, 14 Id. 172, for cases in which the obligation of payment for services is implied from much slenderer material.

This precise question arose in the case of *Freeman v. City of Boston*, 5 Met. 56. The mayor and aldermen of the city of Boston passed an order that a reward of five hundred dollars be offered to any person who shall give information so that any person shall be convicted of setting fire to any building for the purpose of burning the same. An advertisement was inserted in the city newspapers which were published the next morning after the order was passed, reciting that sundry houses and other buildings had recently been set on fire, and offering a reward of five hundred dollars to any person who should give information to that any perpetrator of these outrages shall be convicted. Shaw, J., said, in delivering the opinion of the court: "This is an action of *assumpsit* against the city of Boston, to recover a reward of five hundred dollars for giving information of persons who had been guilty of setting fire to dwelling-houses. The plaintiff claims this, on the ground that after the offer of a reward by the mayor and aldermen, in the manner hereinafter stated, he gave such information as to lead to the detection, trial, and conviction of one Russell and one Crockett."

The principle on which the action is brought is now well settled. It is this: The offer of a reward or compensation, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good compensation, and the offer becomes a legal and binding contract. Of course, until the performance, the offer of a reward is a proposal merely,

and not a contract; and therefore, may be revoked at the pleasure of him who made it. A leading case on the subject of an action on the offer of a reward by public advertisement is *Symmes v. Frazier*, 6 Mass. 344 [4 Am. Dec. 142]. So in *Loring v. City of Boston*, 7 Met. 411, which was a suit of the same general character, the same eminent judge said: "There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal on the part of the person making it, to all persons, which any one capable of performing the service may accept at any time before it is revoked, and perform the service; and such offer on one side, and acceptance and performance of the service on the other, is a valid contract, made on good consideration, which the law will enforce. That this principle applies to the offer of a reward to the public at large was settled in the case of *Symmes v. Frazier*, 6 Mass. 344 [4 Am. Dec. 142], and has been frequently acted upon, and was recognized in the late case of *Wentworth v. Day*, 3 Met. 352. See also *Gilmore v. Lewis*, 12 Ohio, 281. The same doctrine is held in England: See *England v. Davidson*, 11 Ad. & El. 856; *Lancaster v. Walsh*, 4 Mee. & W. 16; *Williams v. Cowardine*, 4 Barn. & Adol 621; Chit. Con. 474, note 8.

3. It has been seen that this reward was not offered merely for information, but for such information as would be sufficient to convict the criminal. This could only be determined by the event of the trial; and before trial and conviction, the plaintiff would have no claim on defendant for the money. It seems that the trial took place and conviction was had in January, 1857—if there be not some mistake in the dates as given in the transcript. The question, then, as to the statute of limitations is, When did it commence running? and what period applies? There is no doubt that the statute did not begin to run until the conviction of the felon. The statute (Wood's Dig. 47, sec. 17) provides that an action or liability founded upon an instrument of writing, except, etc., shall be brought within four years after the accrual of the cause of action.

This was, therefore, according to these authorities, a contract in writing, upon the acceptance of the terms of it by the plaintiff and his performance of the services. The action is really founded on this written contract, though extrinsic parol facts be necessary to give it effect as a cause of action—as is the case in suits on warranties, conditional agreements, and various

other written instruments. Since the acceptance, four years have not transpired, nor, of course, since the conviction.

It follows that the lower court erred in sustaining the demurrer.

Judgment reversed, and cause remanded.

COPE, J., concurred.

ADVERTISEMENT OFFERING REWARD MAY BECOME CONTRACT. Where an advertisement is published, or a statement otherwise publicly proclaimed, offering a reward for the return of lost property, the arrest or conviction of a criminal, or other special service, an acceptance of it by any person who is able to give the information asked, or to return the property, or to otherwise perform the conditions of the offer, creates a complete and valid contract, and on complying with its terms, an action can be maintained to recover the reward offered: *Picerson v. Morch*, 82 N. Y. 503; *Reif v. Paige*, 55 Wis. 496-503; *Cummings v. Gann*, 62 Pa. St. 484-490; *Morrell v. Quarles*, 35 Ala. 544; *Furman v. Parke*, 21 N. J. L. 310; *Hanson v. Pike*, 16 Ind. 140.

Notice of Acceptance of Offer not Necessary.—It is generally held that it is not necessary to give notice to the party offering a reward that his offer has been accepted and is being acted upon: *Hanson v. Pike*, 16 Ind. 140; *Hayden v. Souger*, 56 Id. 42; *Wilson v. McClure*, 50 Ill. 366; *First National Bank v. Hart*, 55 Id. 62; *Reif v. Paige*, 55 Wis. 503.

Publication.—In general, such offers are made by means of advertisements in newspapers; but other methods of publication are equally as good. In *Reif v. Paige*, 55 Wis. 496-503, a man standing in the midst of a crowd before a burning building, shouted, "I will give five thousand dollars to any person who will bring the body of my wife out of that building, dead or alive." This was held a sufficient offer. So a telegram sent to a sheriff stating that a reward of fifty dollars would be paid for the recovery of a certain horse which had been stolen was held to be an offer to anybody who should perform the service: *Cummings v. Gann*, 52 Pa. St. 484-490; mailing circulars is a competent means of making the offer: *First National Bank v. Hart*, 55 Ill. 62; or a verbal declaration at a public meeting: *Wilson v. McClure*, 50 Id. 366; an offer of a reward by a governor becomes effective from the signing of the proclamation, and its entry upon the executive journals, without further publication: *Auditor v. Ballard*, 9 Bush, 572.

Performance of Terms of Offer is Good Consideration.—A performance of the terms of an offer of a reward is a good and sufficient consideration to support an action for its recovery: *Morrell v. Quarles*, 35 Ala. 544. This is so even where the person making the offer had no direct interest in the performance of such services: *Furman v. Parke*, 21 N. J. L. 310.

How Long Offer Holds Good.—Until the performance of the services specified in the offer of a reward, it is a proposal merely, and not a contract, and may be revoked at pleasure: *Hanson v. Pike*, 16 Ind. 140; *Cunningham v. Gann*, 52 Pa. St. 484-490. In *Loring v. City of Boston*, 7 Met. 409, the court say that such an offer must not be considered as unlimited in its duration, and continuing until it is formally withdrawn; but that it must be limited to a reasonable time. In this case, a lapse of over three years was held to have extinguished it. In Connecticut, however, they endow such offers with more life. In a case where a reward was offered for the arrest of an incendiary, it was held that the offer was not barred by lapse of time, but continued, and was binding, until the statute of limitations had run against the crime: *Matter of Kelly*, 39 Conn. 159.

Necessity of Knowledge that Reward had been Offered.—Upon the question whether it is necessary that the claimant should have had notice of the existence of an offer of a reward, at the time he performed the services therein specified, in order to entitle him to recover, the cases conflict, and we will not assume the responsibility of saying upon which side the weight of authority rests. There is great weight of authority in support of the proposition that such previous knowledge is not necessary. "If the offer was made in good faith, why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that any one who has an opportunity to prevent the success of a crime may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?" *Dawkins v. Sappington*, 26 Ind. 199; To the same effect are *Russell v. Stewart*, 44 Vt. 170; *Auditor v. Ballard*, 9 Bush, 572; *Eagle v. Smith*, 4 Houst. 293; *Crawshaw v. City of Roxbury*, 7 Gray, 377. But the contrary is as stoutly maintained in *Stamper v. Temple*, 6 Humph. 113; *Hewitt v. Anderson*, 56 Cal. 476; *Marion v. Treat*, 37 Conn. 96; *City Bank v. Bange*, 2 Edw. Ch. 95; *Howland v. Lounds*, 51 N. Y. 604; and such also appears to be the tendency of *Morrell v. Quarles*, 35 Ala. 544, and *Reif v. Paige*, 55 Wis. 496-503.

Performance.—A substantial compliance with the terms of the offer is generally held sufficient to entitle the claimant to a recovery of the reward: *Gilkey v. Bailey*, 2 Harr. 359; *Smith v. Moore*, 1 Com. B. 438; *Salvadore v. Crescent Mut. Ins. Co.*, 22 La. Ann. 338; *Louisville & N. R. R. Co. v. Goodnight*, 10 Bush, 552; *Beese v. Dyer*, 9 Allen, 151; *Brennan v. Haff*, 1 Hill, 151. But a reward offered for the apprehension and conviction of any one implicated in the murder of four persons cannot be recovered by one who secured the conviction of persons implicated in the murder of but one of them: *Furman v. Parke*, 21 N. J. L. 310. So a reward offered for the arrest and conviction of the persons who committed a certain crime is not earned by one who merely communicates to the person robbed his suspicions that a certain person is guilty, with a statement that others were satisfied of his guilt, and that circumstances pointed strongly towards him: *Burke v. Wells, Fargo, & Co.*, 50 Cal. 218; see also *Franklin v. Heiser*, 6 Blatchf. 426. Several persons may join in claiming a reward, and it is only necessary for them to show that it was through their joint efforts that the services were performed; they need not show that they all did the work, but that each performed a part: *Goldsborough v. Cradie*, 28 Md. 477; *Fargo v. Arthur*, 43 How. Pr. 193; *Janerin v. Town of Exeter*. 48 N. H. 83.

GREGORY v. FORD.

[14 CALIFORNIA, 123.]

PETITION TO SET ASIDE JUDGMENT—MERITS.—A defendant having no defense to an action, wherein a judgment by default was rendered against him upon a return by the sheriff of service of process, cannot enjoin such judgment upon the ground that the return was false, and that in fact he had no notice of the proceeding.

EQUITY WILL PERMIT PARTY WHO HAS ACQUIRED WITHOUT FRAUD LEGAL ADVANTAGE to keep it as a means of securing a just debt; it will not divest him of it in favor of a party who comes into equity acknowledging that he owes the debt, and claims only the barren advantage of being permitted to defend against an action therefor, to which he has no defense.

EQUITY, WHERE PARTY SEEKS TO HAVE JUDGMENT BY DEFAULT RECOVERED AGAINST HIM, UPON SHERIFF'S FALSE RETURN OF SERVICE UPON HIM, SET ASIDE.—Where a party does not deny the indebtedness for which the judgment was rendered, it would be as equitable to turn him over to his action against the sheriff for a false return as to relieve him from the judgment and turn the defendant for redress to the sheriff, the statute having barred the debt.

COURTS OF EQUITY DO NOT INTERFERE WITH JUDGMENTS AND PROCEEDINGS of courts of law except in peculiar cases. They do not interpose to correct the errors or irregularities of the law courts. They only interpose upon equitable grounds to do justice, when, from their organization or otherwise, the common-law tribunals are incapable of rendering it. There must be substantial merits; they seldom or never give effect to a mere technical right.

PARTY WHO SEEKS TO HAVE JUDGMENT WHICH WAS IMPROPERLY RECOVERED against him set aside must pay into court the sum which by his own statements he has shown himself to owe to plaintiff. He who seeks equity must do equity.

COURT OF EQUITY WILL RESTRAIN UNJUST JUDGMENT for want of notice after a false return of service by the sheriff.

WHERE DEFECT IS RADICAL, GOING TO VERY FOUNDATION of the action, where the error in the decree is apparent by reference to the bill and the decree, the aggrieved party may assign error, although no demurrer has been interposed.

COURT OF EQUITY HAS NO JURISDICTION TO RELIEVE AGAINST IMPROPER ISSUANCE of a second execution. This error, if it was one, the court issuing it could correct.

BILL to vacate a judgment. Plaintiff had judgment below, and defendant took this appeal.

Swezy, for the appellants.

Reardan and Smith, for the respondent.

By Court, BALDWIN, J. This is a bill filed by the plaintiff to vacate a judgment rendered against him and others in 1853, in favor of Jesse O. Goodwin. The bill alleges that after the rendition of the judgment, execution issued on it, and was levied on some property of the other defendants thereto, which property was sold by the sheriff, and as plaintiff believes, for enough to pay the execution. The bill further charges that the plaintiff had not, until the seventeenth day of December, 1857, any knowledge of the existence of this judgment against him; that

he was never served with any summons and certified copy of complaint therein, nor with either, and never had any knowledge of any such action. It is then alleged that the execution first issued never was returned nor its loss shown, nor any reason given for the failure. The bill prays for an injunction. The parties defendant are Thornburgh, the sheriff, and Ford, who is charged to be the assignee of Goodwin. Ford answered, denying the allegations of the complaint. The court found that the plaintiff had no notice. The summons was returned executed on him. The evidence shows that upon the writ appeared the name of plaintiff as one of defendants, served by the sheriff, but that this name seemed to be written in place of another name or word scratched out; and the evidence tended to show that at the date of the service, as returned, defendant was out of the county. But no fraud is charged in the return, nor is it charged that the sheriff did not return the summons executed as it appears, nor that any alteration has been made in the return. Nor is it charged that the defendant had any defense to the note, which was the foundation of the action; but on the contrary, there is evidence that the defendant owed the debt, and that it is still due.

The case, then, on the pleadings and proofs resolves itself into this proposition of law: can a defendant having no defense to an action, enjoin a judgment by default obtained on a return by the sheriff of service of process upon the ground that the return is false; that in fact he had no notice of the proceeding? It is difficult to see upon what principle chancery would interfere in any such case in favor of such a defendant. In analogy to its usual course of procedure, it would seem that the plaintiff, having acquired, without any fraud on his part, a legal advantage, would be permitted to retain it as a means of securing a just debt; and that a court of equity would not take it away in favor of a party who comes into equity acknowledging that he owes the money, and claims only the barren right of being permitted to defend against a claim to which he had no defense. It would certainly seem that it would be quite as equitable to turn the defendant in execution over to his remedy against the sheriff for a false return, under such circumstances, as to relieve him from the judgment, and turn the plaintiff for redress to the sheriff. For the effect of vacating the judgment now would be to release the defendant from the debt, as the statute of limitations has intervened. Courts of equity do not interfere with the judgments and proceedings

of the courts of law, except in peculiar cases. They do not interpose to correct the errors or irregularities of the law courts.

They only interpose upon equitable grounds—to do justice when, from their organization or otherwise, the common-law tribunals are incapable of rendering it. They seldom or never interfere to give effect to a mere technical right. There must be substantial merit. *Fowler v. Lee*, 10 Gill & J. 363 [32 Am. Dec. 172], is a case not substantially different from this in fact or principle. There, the charge in the bill was “that the complainant was never served with process by the sheriff of Prince George’s county, or either of his deputies, in consequence whereof judgment was obtained against him by means of fraud and surprise.” The court says: “Courts of chancery do not lightly interfere with judgments at law. It is only for the prevention of fraud, or to relieve from substantial injury or gross injustice, that its high and extraordinary power of interference by injunction is ever resorted to. It is never exerted merely for the correction of informalities or irregularities in legal or judicial proceedings. He who seeks to avail himself of such defects must prosecute his remedies at law; from a court of equity he can receive no countenance. A court of chancery, too, looks well to the consequences of its acts, and the case must indeed be a strong one which would induce it to nullify a judgment at law, and thus, as here, put it in the power of a debtor to plead the statute of limitations to a debt which he does not deny to be justly due.

“But suppose a court of equity would relieve against a judgment rendered under the circumstances before mentioned, upon what terms would relief be granted? ‘He who seeks equity must do equity,’ is a maxim almost as old as the tribunal to which it applies. To obtain relief by injunction against this judgment, Semmes should, by his bill, have offered to do equity, by paying into court that which, by his own statements, he had shown himself in honor and in conscience under an obligation to pay. It may be said that Semmes could not safely have paid the debt for which the judgment was rendered; that he might again be compelled to pay the same debt to the legal representatives of George R. or John Fitzgerald. If such was his apprehension, he has not relied on it as a ground of relief; and if he had, it was his duty to have filed a bill of interpleader against such representatives and the appellee, and paid the debt into court, to be held for the benefit of the party showing his right to receive it.”

In *Crafts v. Dexter*, 8 Ala. 769 [42 Am. Dec. 666], the court say that it is a question of great difficulty whether a defendant can come into equity to enjoin an unjust judgment for want of notice after a return of service by the sheriff. But the court held that he could, on the authority of *Brooks v. Harrison*, 2 Ala. 209. See also 5 Litt. 109. Many other cases might be cited to the same effect, but it is unnecessary to cite them, for we believe the doctrine is not disputed in any case; at least, we have found none, and been referred to none: See *Egery v. Bachanan*, 5 Cal. 56; *Whitwell v. Barbier*, 7 Id. 54; and the recent case of *Holmes v. Laffan*, for an analogous principle.

It is true, no demurrer was filed to the complaint, but the defect is radical, going to the foundation of the action. The error of the decree is apparent by reference to the bill and the decree, in which case we have held that the party aggrieved may assign error in the judgment, though no demurrer be interposed. The case made by the plaintiff himself clearly shows that he was not entitled to any relief, or, as said in *Fowler v. Lee*, 10 Gill & J. 363 [32 Am. Dec. 172], "the complainant's equity must be shown by the bill or he is entitled to no relief." See also the case of *Tryon v. Sutton*, 13 Cal. 490; and *Green v. Covillaud*, 10 Id. 317 [70 Am. Dec. 725]. This error seems to have been specially assigned, in the points filed by the appellant.

There is no pretense that a court of equity has any jurisdiction on the last ground in the bill—the improper issuance of the second execution. This error, if it were one, the court issuing it could correct, and chancery has no cognizance of the irregularities alleged: See the numerous cases cited in appellant's brief.

It follows that the decree of the court below must be reversed, and the bill dismissed. —

COPE, J., concurred.

On petition for rehearing, the following opinion was delivered:

BALDWIN, J. We deny the petition in this case. Our opinion did not misapprehend any material fact in the record. The bill does not charge that there was no service of process upon the plaintiff, who was defendant in the case, the judgment in which is sought to be enjoined. The general charge is made that the plaintiff was not served with process, but the bill does not charge that the sheriff did not return the summons as served. There is nothing necessarily inconsistent in

the asserted fact that the plaintiff was not served with process, and the return of the sheriff that he was. The judgment of the court recites that the defendant was served with process, and the fact that there appeared, years afterward, to be some erasure or interlineation on the return of the process, in the absence of a direct attack upon it for fraud, or forgery, or alteration, is entirely too small a circumstance to justify a finding that the return was not regularly made by the officer. If we were to hold that this was sufficient to nullify the return, the consequence might be to shake confidence in and impair the effect of judicial proceedings.

The case made by the bill is as we put it in the opinion—the case, namely, of a defendant in a judgment impliedly confessing the justice of the claim of the creditor, and seeking in equity to set aside the judgment by merely averring that he was not actually served with process, and we think we showed, both from reason and authority, that this cannot be permitted.

Rehearing denied.

COPE, J., concurred.

EQUITY WILL RELIEVE AGAINST JUDGMENT OBTAINED IN ACTION AT LAW in which the complainant was not served with process, and of which he had no notice, if it appears from the allegations of the bill that the complainant had a good defense to such action: *Crafts v. Dexter*, 42 Am. Dec. 666. Petition in equity to have judgment set aside for lack of notice to defendant must state that the sum for which the judgment was rendered was not due to the plaintiff, or that it operated oppressively to defendant, and that he had a good defense at law: *Piggott v. Addicks*, 56 Id. 547.

EQUITY, WHEN WILL RELIEVE AGAINST JUDGMENT AT LAW.—General rule is that equity will not relieve against judgment at law unless complainant can show that he had a good defense of which he was entirely ignorant, or unless he was prevented from availing himself of his defense by fraud or accident, or the act of the adverse party, unmixed with negligence or fault on his own part: *Stroup v. Sullivan*, 46 Am. Dec. 389; *Bellamy v. Woodson*, 48 Id. 221; *Skinner v. Deming*, 54 Id. 463. No degree of wrong or injustice in determining causes at law will entitle the injured party to relief in equity, unless there is some special equitable ground for its interposition: *Pollock v. Gilbert*, 60 Id. 732. Chancery does not interfere with judgments at law except to prevent fraud or to relieve from gross injustice; and they never grant an injunction merely for the correction of irregularities in legal proceedings: *Fowler v. Lee*, 32 Id. 172. It has no authority to correct errors in judgment of a court of law; that is the province of an appellate tribunal: *Yarborough v. Thompson*, 44 Id. 626. But courts of equity will relieve against a judgment obtained by fraud, accident, surprise, or mistake, or where the complainant's defense was of an equitable character: *Emerson v. Udall*, 37 Id. 604; *Pierce v. Chastain*, 46 Id. 423; *Bank of Tennessee v. Patterson*, 47 Id. 618; *Lockwood v. Mitchell*, 53 Id. 438; *De Louis v. Meek*, 50 Id. 491; *Pollock v. Gilbert*, 60 Id. 732; *Dobson v. Pearce*, 62 Id. 152, and notes.

IRREGULARITY IN CARRYING DECREE OF COURT INTO EFFECT confers no authority on a court of equity to interfere, as it is competent for the court itself to pass upon and correct this matter: *Tooley v. Gridley*, 41 Am. Dec. 628. So chancery cannot correct mistake made by a clerk in entering up a judgment at law: *State Bank v. Young*, 52 Id. 501.

THE PRINCIPAL CASE IS CITED to the point that in order to have a judgment by default set aside, it is necessary, among other things, to show that the defendant has a good defense to the action upon the merits, in *People v. Rains*, 23 Cal. 127. It is also cited to the point that if a party to an equitable action has a plain and speedy remedy by motion in the action, he cannot maintain a separate suit in equity to obtain the desired relief: *Ketchum v. Crippen*, 37 Id. 223-228; and to the same point substantially in *Logan v. Hillegass*, 16 Id. 200. It is cited with approval in *Gibbons v. Scott*, 15 Id. 286, the facts of which are almost identical with our principal one. In this case, however, an effort was made to show that the complainant had a good defense, but his application was denied because of its insufficiency.

AGUIRRE v. PACKARD.

[14 CALIFORNIA, 171.]

INTEREST FOLLOWS CONTRACT ACCORDING TO LAW IN EXISTENCE at the time and place of the contract, or of the performance of it, and a subsequent change in the legal rate does not affect the contract. Consequently, where the legal rate was six per cent at the time a contract was entered into, but was afterwards changed to ten, it is improper to allow six per cent up to that time and ten per cent afterwards.

WHERE DEMAND PRESENTED TO ADMINISTRATOR DOES NOT CLAIM INTEREST, none can be allowed, unless, perhaps, upon its face the paper showed that interest resulted as a matter of course from the facts stated as constituting the claim.

PLAINTIFF presented his duly verified claim to defendant as administrator, and it was rejected. He thereupon commenced this suit, and the jury returned a verdict in his favor for the amount of his claim, with interest at six per cent up to a certain date, and at ten per cent from that date until the day of trial. Judgment was entered accordingly, and defendant appealed.

Lies, for the appellant.

Sloan, for the respondent.

By Court, BALDWIN, J. The finding of the court in this case was erroneous. The account presented by the plaintiff against the estate of the intestate is an open account running through several years. Interest is allowed at the rate of six per cent per annum on the balance sued for, for some eighteen months; and then interest on this same balance for eight years and ten

months, at ten per cent per annum. We suppose that the rule adopted was to charge interest at six per cent until the passage of our statute on the subject of interest—as the rate of interest obtaining in California under the Mexican dominion—and until the state had been formed and enacted a new law, and to charge interest afterward according to that law. But this is inadmissible. Interest follows the contract according to the law in existence at the time and place of the contract, or of the performance of it. But a subsequent change of the legal rate of interest does not affect the contract. It does not appear where this contract was made. The account presented to the administrator does not show any item of interest.

Perhaps this would not be necessary if the face of the paper showed that interest resulted as a matter of course from the facts stated as constituting the claim. But when this does not appear, we think that the party cannot recover on this account any more than for an article of goods or other item of indebtedness omitted from the statement of claim presented to the administrator: See Wood's Dig. 404.

The question of prescription is not very clearly presented on the pleadings and facts, and it is not necessary for us to pass upon it.

Judgment reversed, and the case remanded for a new trial.

COPE, J., concurred.

THE DOCTRINE OF THE PRINCIPAL CASE appears to be supported by the authorities. A contract specifying no rate of interest is not affected by a subsequent statute changing the legal rate of interest; but that the rate as it existed at the time the contract was entered into is the one which shall control it. In speaking of such an act, the court, in *Bryan v. Moore*, Minor, 377, say: "The act of February, 1818, is to be understood as operating only on contracts made after its enactment. The law of the contract when it was made enters into and makes a part of the contract, and the parties cannot complain if they are held to a compliance according to the terms on which they mutually agreed." To the same effect: *Myrick v. Battle*, 5 Fla. 345; *Thorntons v. Fitzhugh*, 4 Leigh, 209; *Lee v. Davis*, 1 A. K. Marsh. 397; *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424; *Seymour v. Connecticut Life Ins. Co.*, 44 Conn. 300; *Stark v. Olney*, 3 Or. 88; *Besser v. Hawthorn*, Id. 129; *Association for Relief of Aged Indigent Females v. Eagleson*, 60 How. Pr. 9; *Bullock v. Boyd*, 1 Hoff. Ch. 294; *White v. Lyons*, 42 Cal. 279.

PICO v. WEBSTER.

[14 CALIFORNIA, 202.]

WHERE SURETY UNDERTAKES THAT PRINCIPAL SHALL DO SPECIFIC ACT, as that he will pay a judgment, the judgment against the principal is conclusive against the surety. No notice to the surety is required, as he stipulated without regard to it.

SURETIES UPON OFFICIAL BONDS ARE NOT BOUND BY JUDGMENT against their principal in an action to which they were not parties. They undertake, in general terms, that the principal will perform his official duties, but do not agree to be absolutely bound by any judgment obtained against him for his official misconduct. They have a right to be heard, and to contest the question of their liability.

ACCORDING TO COMMON-LAW RULES, PARTIES NOT SUED IN ACTION OF TRESPASS cannot be brought in by mere notice where there is no pretense that they were trespassers. They must have legal notice, which is the notice required by statute, or make voluntary appearance as parties to the record.

JUDGMENT IS ALWAYS ADMISSIBLE IN EVIDENCE AS PROOF OF ITS RENDITION, when that fact is important or relevant, but not as proof to charge a stranger directly by its operation.

ACTION upon an official bond. The opinion states the case.

Perley, for the appellants.

Bridges, for the respondent.

By Court, BALDWIN, J. This suit was brought on the official bond of defendant Webster, who was sheriff of San Joaquin county, against Webster and his sureties. The suit was brought to recover damages for the levy by Webster on property of plaintiff, which levy was made under color of process. Suit was brought against Webster for the trespass involved in this levy and seizure, and judgment recovered against him before the institution of this suit. The record of this recovery was offered as evidence by the plaintiff on the trial. The defendants offered to prove, on their part, that Webster was not guilty of the trespass complained of, and that the property seized was not the property of the plaintiff here. But the court refused to admit the testimony, upon the ground that the judgment against the sheriff was conclusive of all the facts passed upon and decided by the record. To this ruling the defendants excepted, and now present it for review here on appeal.

There is no little conflict in the cases on this subject. There can be no doubt that where a surety undertakes for the principal that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judg-

ment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact: *Wain v. Gold*, 5 Pick. 480; *Lincoln v. Blanchard*, 17 Vt. 464. See also *Riddle v. Baker*, 13 Cal. 295. It is upon this ground that the liability of bail is fixed absolutely by the judgment against the principal. But this rule rests upon the terms of the contract. In the case of official bonds, the sureties undertake in general terms that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained against him for official misconduct, nor to pay every such judgment. They are only held for a breach of their own obligations. It is a general principle that no party can be so held without an opportunity to be heard in defense. This right is not divested by the fact that another party has defended on the same cause of action and been unsuccessful. As the sureties did not stipulate that they would abide by the judgment against the principal, or permit him to conduct the defense and be themselves responsible for the result of it, the fact that the principal has unsuccessfully defended has no effect on their rights. They have a right to contest with the plaintiff the question of their liability; for to hold that they are concluded from this contestation by the suit against the sheriff is to hold that they undertook for him that they would be responsible for any judgment against him, which might be rendered by accident, negligence, or error, instead of merely stipulating that they would be responsible for his official conduct. The authorities which sustain this view are numerous. In *McKellar v. Howell*, 4 Hawks, 34, a decree against the administrator of a guardian was held not to be evidence against the sureties of the guardian to charge them with the amount which was recovered against the estate for unfaithful administration of the trust. *Munford v. Overseers of the Poor*, 2 Rand. 313, went a little further, holding that a judgment against the sheriff was no estoppel against him in an action on the bond against him and his sureties. It seems to be held there that no recovery could be had against the principal, because he was not liable jointly with the sureties, and that the record of the judgment would be only *prima facie* evidence against the sureties. *Beut v. Beck*, 3 Har. & M. 242, is to the same effect. *Douglass v. Howland*, 24 Wend. 35, is a leading case. The authorities are

reviewed by Mr. Justice Cowen with his usual learning. That case was covenant, brought by the plaintiff against the surety on an obligation by the principal, to account and pay over such sum as shall be found to be owing by him, and the surety covenanted that the party thus agreeing "shall perform the agreement." A decree in chancery against the principal was offered. The decree was on a bill filed to compel an account; held, that it was no evidence against the surety, unless he had notice of the suit, and an opportunity to defend, in the name of the principal. Many authorities are cited by the learned judge, who concludes that the surety's obligation was to pay over a balance due, not that he should abide by a judgment at law, or a decree in chancery, for not accounting.

A distinction is taken as to administration bonds founded upon the terms of the obligation, as used in South Carolina and other states—those being that the administrator should account, meaning account before the probate court—which was held equivalent to an obligation by the surety to pay such decree as that court might render: See 1 Phill. Ev., Cowen and Hill's Notes, 994. The same doctrine was involved in the case of *Moss v. McCullough*, 5 Hill, 131. It was there held that in general a judgment obtained by a creditor against the principal is not evidence against the surety, for the purpose of establishing the demand. In this case, suit was brought against a stockholder of a corporation organized under the New York laws, the stockholder under the act not being responsible until after judgment against the corporation; held, that the judgment against the corporation could not be used against the defendant, either as *prima facie* or conclusive evidence of the genuineness of or responsibility for the debt. Previous decisions of the court, *Slee v. Bloom*, 20 Johns. 669 [10 Am. Dec. 273], and *Moss v. Oakley*, 2 Hill, 265, are explained, and *Douglass v. Howland*, 24 Wend. 35, is affirmed. The court say: "The contract is to pay the debt, not the judgment. The general doctrine of *Douglass v. Howland* has been recently reviewed in the court of errors: *Jackson v. Griswold*, 4 Hill, 522. The question was embarrassing, and the cases far from being uniform. The decided weight of authority, however, both at law and in equity, was found to be against allowing the surety to be at all embarrassed by the judicial proceeding. He stands, as was held in *Slee v. Bloom*, on the precise rights of his principal under the contract. If the latter can defend, so can the surety. The surety is bound by the acts *in pais* of

the principal or his agents, but is neither bound nor touched by any judicial proceeding to which the principal alone is a party; nay, says *Jackson v. Griswold*, even though he actually participate in the prosecution or defense, unless he be a party to the record." Bronson, J., delivered a separate opinion affirming this view of the question.

The case of *Jackson v. Griswold*, 4 Hill, 522, is as just stated. The doctrine of *Douglass v. Howland*, 24 Wend. 35, is affirmed, and the *dicta* in that case, that the surety might be bound by notice other than that required in the usual course of proceeding to bring in or bind a party, withdrawn: See *Davis v. McNees*, 8 Humph. 40. *Carmack v. Commonwealth*, 5 Binn. 184, is a strong and well-reasoned case to the same effect.

It is true, there are authorities to the contrary of great weight. In *City of Lowell v. Parker*, 10 Met. 314, it was held the judgment was *prima facie* evidence against the surety. So in *Masser v. Strickland*, 17 Serg. & R. 354 [17 Am. Dec. 668], and several other Pennsylvania cases; and in *McLaughlin v. Bank of Potomac*, 7 How. 220. But in *Masser v. Strickland*, *supra*, the authority is weakened by the able dissenting opinion of Chief Justice Gibson, who coincides with his predecessor Chief Justice Tilghman, in 5 Binney. The English rule seems to be that laid down in New York. See *King v. Norman*, 4 Com. B. 884, where it was held that the judgment against a surety who gave no notice to the principal was no evidence against the principal. The action was to recover money paid by plaintiff as surety on a tax collector's bond.

This precise question arose in the case of *Carmichael v. Governor*, 3 How. (Miss.) 236. Mr. Chief Justice Sharkey delivered the opinion, holding that a judgment against the sheriff on motion to pay over money is not evidence in an action against the sureties on the sheriff's bond, to establish the breach thereof in failing to pay over money. The court cite the case of *Carmack v. Commonwealth*, 5 Binn. 184, as authority; also 1 Starkie on Evidence, 182, 189; and place its reasoning upon the same grounds as those we have before assumed; and it adds, "that if the judgment was admissible in evidence, it was certainly conclusive unless it was fraudulent, and the consequences would be, that Carmichael would be bound by a judgment to which he was no party, and had no opportunity of making a defense, and which might have been sufficient if he had been permitted to defend." *Lucas v. Governor*, 6 Ala. 826, is to the same purpose.

We cannot see how, if the judgment be evidence at all, it is

less than conclusive in the absence of fraud or collusion. The reason which admits it must be broad enough to give it conclusive effect.

Nor is there anything in the point that these defendants had notice. They must have had legal notice, which we have held to be that required by statute, or make voluntary appearance as parties to the record. According to common-law rules, a plaintiff cannot bring in parties not sued in an action of trespass by mere notice, when there is no pretense that they were trespassers.

A judgment is always admissible as proof of its rendition when that fact is important or relevant, but not proof to charge a stranger directly by its operation.

It follows that the judgment must be reversed, and cause remanded for a new trial.

FIELD, C. J., and COPE, J., concurred.

JUDGMENT OBTAINED IN SUIT AGAINST CONSTABLE for official misconduct or negligence is conclusive evidence of the liability of the sureties upon his official bond, in an action brought against them to recover the amount of such judgment: *Evans v. Commonwealth*, 34 Am. Dec. 477. Such a judgment is evidence against the sureties, although they were not notified of the original action: *City of Lowell v. Parker*, 43 Id. 436; see *Heard v. Lodge*, 32 Id. 197, and note discussing the question.

SURETIES ON SHERIFF'S BONDS—NATURE OF LIABILITY OF: See note to *Commonwealth v. Cole*, 46 Am. Dec. 509, where the subject is discussed at length.

RECORD OF VERDICT AND JUDGMENT IS ALWAYS ADMISSIBLE to prove the fact that such judgment was rendered, or such verdict returned, in any case where the fact of such verdict or judgment, or the nature or amount of such judgment, becomes material; but for any other purpose, it is not evidence against a stranger: *Littleton v. Richardson*, 66 Am. Dec. 759.

THE PRINCIPAL CASE IS CITED, with a number of others, in *McNabb v. Wixom*, 7 Nev. 163-173, where the court raise the question whether a decree of distribution is conclusive or even *prima facie* evidence of anything more than the fact of its rendition against the sureties on an administrator's bond. They do not decide the question.

KOCH v. BRIGGS.

[14 CALIFORNIA, 256.]

TRUST DEED, MORTGAGE, FORECLOSURE.—Where defendant, being indebted to plaintiff upon a promissory note, conveyed certain land to a third person upon trust that if he failed to pay the note according to its tenor the trustee was to advertise the property for sale, sell it at auction to the highest bidder, and out of the proceeds of the sale pay the note, the expenses of sale, etc., the instrument is a trust deed, and not a mortgage.

It has no feature in common with a mortgage except that it was executed to secure an indebtedness, and the defendant's title may be divested as in the deed recited, and without a judicial foreclosure and sale.

WHAT CONSTITUTES MORTGAGE.—In every mortgage, however we regard it in relation to the nature of the estate created thereby, there is a right after condition broken to a foreclosure on the part of the mortgagee and a right of redemption on the part of the mortgagor. These two rights are mutual and reciprocal. When one cannot be enforced, the existence of the other is denied, and when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage.

TRUST DEED, MORTGAGE, FORECLOSURE.—Where an instrument made to secure an indebtedness provides that a trustee shall sell the property mentioned in the instrument, and out of the proceeds pay the debt, it is a trust deed, and a judicial foreclosure and sale is not necessary. Decree of foreclosure and sale can only be based upon the contract of the parties, and in this case equity could not make such a decree as in case of a mortgage, without disregarding the express contract of the parties.

IN CASE OF TRUST DEED, EQUITY WILL LIMIT ITS RELIEF to the contract made, and effectuate a sale only by enforcing the performance of the trust.

EQUITY OF REDEMPTION.—Equity of redemption is enforced in case of mortgage to give effect to the intent of the parties against the legal consequences of the form of their undertaking, it being in form a conveyance, while in truth it is only a contract of security. The case is different with a trust deed. In the performance of the trust, the contract of the parties, in fact and in intention, is carried out.

ACTION to recover possession of land. The opinion states the facts. Defendant had judgment below, and plaintiff appeals.

Crocker, for the appellant.

Ralston and Hermance, for the respondents.

By Court, FIELD, C. J. In March, 1858, the defendant executed to the plaintiff his promissory note for the sum of four thousand four hundred dollars, payable in twelve months, with a specified monthly interest, and providing, among other things, that in case the interest was not paid as it monthly matured, or within ten days thereafter, the whole principal and interest should become due at the option of the plaintiff. Simultaneously with the note, the defendant and his wife executed a conveyance of the premises in controversy to Swift, upon the trust, among other matters, that in case of default in the payment of the note or interest, or any part thereof, and upon the application of the holder, he would sell the premises at public auction, at a designated place in the county, to the highest bidder for cash, after fifteen days' previous publication of notice, in one of the newspapers of the county, of the time

and place of sale, and execute to the purchaser a good and sufficient deed of the same, and out of the proceeds, after satisfying the expenses of the advertisement and sale, and of the trust generally, including moneys advanced for taxes, assessments, and other liens, pay the principal and interest due upon the note according to its tenor, and render the surplus, if any, to the grantors or their representatives. The conveyance purports on its face to be made for the express purpose of securing the note referred to, and also provides that the principal and interest shall at once become due and payable upon breach of any of its terms.

The monthly interest not being paid as provided, the holder of the note declared the entire principal and interest due, according to its terms, and gave notice of the same to the maker; and thereupon the trustee proceeded, and in July, 1858, after due publication of notice, sold the premises at public auction to the plaintiff, he being the highest bidder at the sale, and executed to him a deed of the same. Claiming title by this deed, the plaintiff brought the present action of ejectment.

No question was made on the argument as to the power of the wife of the defendant to execute, with her husband, a conveyance upon the trusts and stipulations contained in the deed to Swift, nor any question as to the fairness of the sale by the trustee; but it was insisted that the instrument was in fact a mortgage, under which the title of the defendant could not be divested except by a judicial foreclosure and sale. Assuming, for the disposition of the only point presented, that the wife could unite in the deed creating the trust, we do not regard the deed as subject to the objection of the respondent. It has no feature in common with a mortgage, except that it was executed to secure an indebtedness. This will be evident from a consideration of the rights of parties to a mortgage with reference to the mortgaged property. Where there is a mortgage, there is a right, after condition broken, to a foreclosure on the part of the mortgagee, and a right of redemption on the part of the mortgagor. It matters not whether we consider the instrument a conveyance of a conditional estate in the land, as at common law, or as creating a mere lien or incumbrance for the purpose of security, as by our law. The right to foreclose, whether resulting in vesting an absolute title to the property in the mortgagee, as formerly in England, or in a judicial sale of the premises, as in this state, exists in all cases of mortgage after breach of condition, as does also the right to redeem the

property from forfeiture or from the incumbrance of the lien. These two rights are mutual and reciprocal. When the one cannot be enforced, the existence of the other is denied, and when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage.

In reference to the deed in question, no suit for a foreclosure, as in cases of mortgage in England, would lie, for there could be no forfeiture of the estate to enforce, and of course no equity as against such forfeiture to foreclose. Nor would a suit lie for a foreclosure under our system—that is, for a decree adjudging a sale of the premises, and the application of the proceeds to the payment of the debt, as such suit could only be based upon the contract of the parties, and the contract here is only that, upon the happening of a certain event, the trustee shall sell. Equity could not adjudge a sale, as in case of a mortgage, without disregarding the express contract of the parties and making a new and different one.

Equity would limit its relief to the contract made, and effectuate a sale only by enforcing the performance of the trust.

Nor would any equity of redemption exist if the trust were performed, for in its execution no forfeiture would be asserted from which relief could be sought. In the performance of the trust, the contract of the parties, in fact and in intention, would be carried out, whereas in mortgages, the form of contract is one of conveyance; while in truth, the contract is one only of security, and the equity is enforced to give effect to the intent of the parties against the legal consequences of the form of their undertaking.

The authorities distinguish between an instrument like the one before the court and a mortgage. Thus in *Sampson v. Pattison*, 1 Hare, 536, a conveyance was executed upon trust that the premises should stand chargeable with the payment of one thousand five hundred pounds, and interest, with a proviso that if the money and interest were not paid within two months after notice requiring payment of the same, the party entitled to the money should proceed and sell the premises. The money not being paid upon the required notice, the owners of the demand brought suit, praying in the bill that an account be taken of the amount due on the security, and that the defendants be decreed to pay the same or be foreclosed. In sustaining a demurrer to the bill for want of equity, the vice-chancellor said: "The only question is, What are the terms of the contract? They are, simply, that a certain sum of

money and interest shall be a charge on the estate and if the same be not paid at a particular time, the party entitled to the money shall have power to sell the estate. There is no right of foreclosure arising out of such a contract. Where a charge is created by mortgage, the condition of which is that if the money be not paid at a certain day the estate of the mortgagee shall be absolute at law, this court says that the failure in payment at the day shall not work a forfeiture, notwithstanding the express words of the contract; and upon the bill of the mortgagee, a further time for payment is appointed; if the money be not then paid, the court refuses again to interfere, and leaves the parties to their legal rights. The frame of the instruments under which the parties claim in this case does not bring them in any respect within the principle that the decree of foreclosure proceeds upon. The form of the security points out the manner in which the trust is to be worked out and payment obtained. Notice requiring payment is to be given in a particular manner, and after a certain time, if payment is not made, the trustee may sell the estate."

In *Reece v. Allen*, 5 Gilm. 239 [48 Am. Dec. 386], the deed recited an indebtedness of one thousand dollars from the grantor to a third party, and that the conveyance was made for the purpose of securing its prompt payment on a particular day, and provided that if the money were paid on the designated day the deed should be void, and the trustee should reconvey; but if any part of the money at that time remained unpaid, then the trustee should sell the premises, upon giving notice, at public auction, and execute a conveyance to the purchaser; and the question was presented whether the instrument was a mortgage or a trust deed. The court held it to be the latter, and that it conveyed the absolute legal title to the trustee, and said: "We cannot hold this to be a mortgage without saying that the manifest and clearly expressed intention of the parties shall cease to be the rule of construction."

The deed in question not being a mortgage, the provisions of the two hundred and sixtieth section of the practice act can have no application.

The judgment upon the demurrer must be reversed, with leave to the defendant to answer the complaint within ten days after the *remittitur* is filed in the court below.

Ordered accordingly.

COPE and BALDWIN, JJ., concurred.

NATURE OF MORTGAGE, OR FORECLOSURE THEREOF, AND OF EQUITY OF REDEMPTION is discussed in *McMillan v. Richards*, 70 Am. Dec. 655, and note thereto.

THERE IS WELL-SETTLED DISTINCTION BETWEEN UNCONDITIONAL DEED OF TRUST and a deed of trust in the nature of a mortgage. The former is a conveyance to a trustee for the purpose of raising a fund to pay debts; the latter is a conveyance in trust for the purpose of securing a debt. Other points of difference explained: *Hoffman v. Mackall*, 64 Am. Dec. 637. Whether an instrument is a mortgage or trust deed is determined from ascertaining the real intention of the parties as expressed in the writing: *Reece v. Allen*, 48 Id. 836.

EQUITY OF REDEMPTION IS INSEPARABLY ANNEXED TO MORTGAGE, and cannot be disannexed therefrom, even by the express stipulation of the parties; it cannot be foreclosed by any form of words used in an instrument where the real intention of the parties was to secure the payment of a debt, and not to extinguish it: *Baxter v. Willey*, 31 Am. Dec. 623; *Stephens v. Sherrod*, 55 Id. 776; *Moore v. Anders*, 60 Id. 551, and notes.

THE PRINCIPAL CASE IS CITED, and the nature of a mortgage, its security, the nature of the estate created thereby, and foreclosure, and redemption proceedings discussed at length, in *Goodenow v. Ewer*, 16 Cal. 461-468, and *Dutton v. Warschauer*, 21 Id. 609-620. It is cited in *Cunningham v. Hawkins*, 24 Id. 403-410, to the point that the right to foreclose and the right to redeem are reciprocal; and in *Cormerais v. Genella*, 22 Id. 116, where the court held a certain instrument to be a mortgage, with a power of sale, and not a trust deed.

HULL v. SACRAMENTO VALLEY RAILROAD COMPANY.

[14 CALIFORNIA, 287.]

IN ACTION AGAINST RAILROAD COMPANY FOR SETTING FIRE TO PLAINTIFF'S GROWING GRAIN by means of sparks escaping from its engine, where the proof shows that the result was not probable from the ordinary working of the engine, this establishes *prima facie* that negligence existed where there is no proof that the result happened from any unexpected or uncontrollable accident; and the matter should be left to the jury for them to determine the question of negligence or no negligence. This court will not review their finding.

APPEAL from sixth judicial district. The opinion states the case.

Latham and Sunderland, for the appellant.

Heydenfeldt, for the respondent.

By Court, **BALDWIN, J.** This is an action for negligence, whereby the plaintiff lost his grain growing near the railroad track, which loss was occasioned by fire emitted from the engine of the cars of defendant. The case was tried by a jury, who found for the plaintiff. The main ground of error relied on is, that the verdict is unsustained by proofs.

The plaintiff offered evidence tending strongly to prove that the fire was communicated from the engine of defendant's cars to his grain. But no specific acts of negligence were shown. There was proof to show that this result was not probable from the ordinary working of the engine. The plaintiff now contends that this is itself *prima facie* proof that some reissness or negligence existed, especially as there is no proof that from any unexpected or uncontrollable accident or event the result happened.

The authorities are not agreed upon the question of negligence, or rather the facts which raise the presumption of it. In *Ellis v. P. & R. R. Co.*, 2 Ired. 140, is an opinion of Judge Gaston on a question like this in its general features. That eminent jurist said: "The company are not liable for an injury like that complained of if they use all the care to prevent it which the nature of their business allows; but we also think that, as no evidence was offered to show what care they did use in the case under consideration, there was no foundation laid for asking the instruction. We admit that the *gravamen* of the plaintiff is damage caused by the negligence of the defendants. But we hold that when he shows damage resulting from their act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out *prima facie* a case of negligence which cannot be repelled but by proof of care, or of some extraordinary accident which renders care useless." The case of *Herring v. W. & R. R. Co.*, 10 Id. 402 [51 Am. Dec. 395], reviews the case in 2 Ired. We do not understand it as even questioning that decision, though the court refuse to apply the principle to a different state of facts. The court say: "It was proved that the cars had been running for a long time without doing any damage, and things remaining in the same condition, the fact that fire was communicated on a particular occasion was properly held to be *prima facie* evidence that it was the result of negligence." *Piggot v. Eastern Counties R. R. Co.*, 54 Eng. Com. L. 233, is a case very analogous to this in many circumstances. The court held the defendant liable on the ground of negligence, though the defendant proved that the engines of the company were of the best construction and of adequate power, and that on the occasion in question all practical care had been taken to prevent accidents by fire; all four of the judges sitting held that the fact of the building being fired by sparks emitted from defendant's engine established a *prima facie* case of negligence, which called upon

them to show that they had adopted some precautions to guard against such accidents.

Haylett v. Philadelphia and Reading R. R. Co., 23 Pa. S. 373, is in point. There it is proved that the road passed seventy-seven feet from the dwelling-house of the plaintiff, and that the house was set on fire from sparks from engines passing at a time when the weather was very dry and windy, and the wind blowing across the road to plaintiff's house. The defendant proved that all their engines were in good order, and all provided with good spark-catchers. The lower court directed a verdict for defendant, but the supreme court, on appeal reversed the judgment, holding that the question of negligence, on the facts in that case, was a question for the jury.

The facts in this case should have been put to the jury, for them to determine the question of negligence, or the want of it, and we cannot review their finding.

We have looked at the other points made, but there is nothing in them requiring a detailed examination.

Judgment affirmed.

FIELD, C. J., and COPE, J., concurred.

ACTIONS AGAINST RAILROAD COMPANY FOR FIRES CAUSED BY SPARKS FROM ITS ENGINES.—For a discussion of this question, see *Sheldon v. Hudson River R. R. Co.*, 67 Am. Dec. 155, and note.

THE PRINCIPAL CASE IS CITED in *Illinois Cent. R. R. Co. v. Phillips*, 55 Ill. 202, to the point that proof of accident and injury shows a want of due care, and changes the burden of proof. The rule of the principal case is limited in *Smith v. Hannibal and St. Jo. R. R. Co.*, 37 Mo. 287, where it was held that in an action against a railroad for negligently managing its engines, so that fire was communicated to the standing grass and crops of the plaintiff, the burden of proof is upon the plaintiff to show that the fire was caused by the negligence or want of care of the defendants. There is no legal presumption of negligence in such cases; it must be shown in fact. This is the rule of *Grandy v. Chicago & N. W. R. R. Co.*, 30 Iowa, 420, where it is said that the mere fact that the fire was occasioned by sparks does not make a *prima facie* case against the company.

MOKELUMNE HILL MINING COMPANY v. WOODBURY.

[14 CALIFORNIA, 424.]

PROOF OF CORPORATE EXISTENCE.—The general rule is that the existence of a corporation may be proved by producing its charter, and showing acts of user under it, but this rule has no application to a corporation formed under the provisions of a general statute requiring certain acts to be performed before the corporation can be considered *in esse*, or its transactions possess any validity.

EXISTENCE OF CORPORATION FORMED UNDER PROVISIONS OF GENERAL STATUTE must be proved by showing at least a substantial compliance with the requirements of the statute.

COMPLIANCE WITH STATUTE TO EFFECT INCORPORATION.—In effecting a corporate existence under a general statute, there is a broad distinction between such acts as are declared to be necessary steps in the process of incorporation, and such acts as are required of the individual seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. The former must be strictly observed, or the corporate existence may be successfully impeached in any proceeding in which it is questioned. In respect to the latter, the corporation is responsible only to the government, in a direct proceeding to forfeit its charter.

CORPORATE EXISTENCE.—The filing of a certified copy of articles of incorporation with the secretary of state is not necessary in order to acquire a corporate existence for certain purposes. When the articles are filed with the county clerk, as far as individuals are concerned, the corporation acquires a valid legal existence. The filing of the certified copy with the secretary is exclusively a matter between the corporation and the state, for which the latter alone has a remedy by a direct proceeding.

APPEAL from the fifth judicial district. The opinion states the case.

Heydenfeldt, for the appellant.

Robinson, Beatty, and Heacock, for the respondent.

By Court, COPE, J. It is alleged in the complaint that the plaintiff is a corporation, and this allegation being denied in the answer, the case was tried in the court below upon that issue alone. The plaintiff dates its corporate existence as far back as 1852, and claims to have been duly and regularly incorporated under the general act of 1850, providing for the formation of corporations for manufacturing, mining, mechanical, and chemical purposes. Section 122 of that act provides that any three or more persons who may desire to form a company for either of these purposes "may make, sign, and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing," etc. Section 123 provides that "when the certificate shall be filed as aforesaid," the persons executing the same, and their successors, shall be a body politic and corporate. Section 130 provides that "the copy of any certificate of incorporation filed in pursuance of this act, certified by the county clerk or his deputy to be a true copy,

and of the whole of such certificate, shall be received in all courts and places as presumptive legal evidence of the facts therein stated." On the trial of the case, it was shown that a certificate in conformity with the requirements of the act, had been filed in the office of the clerk of the proper county, and a certified copy thereof was produced and read in evidence, but it was not shown that a duplicate had been filed in the office of the secretary of state. It appeared in proof that the company had been doing business as a corporation since 1852, but the court held that as it was not shown that a duplicate had been filed, as required by the act, the evidence did not establish the fact of incorporation.

The general rule is, that the existence of a corporation may be proved by producing its charter, and showing acts of user under it; but this rule has no application to a corporation formed under the provisions of a general statute, requiring certain acts to be performed before the corporation can be considered *in esse*, or its transactions possess any validity. The existence of a corporation thus formed must be proved by showing at least a substantial compliance with the requirements of the statute. But there is a broad and obvious distinction between such acts as are declared to be necessary steps to the process of incorporation and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form which the fact of incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter. The right of the plaintiff to be considered a corporation, and to exercise corporate powers, depends upon the fact of the performance of the particular acts named in the statute as essential to its corporate existence. Under the issues presented in the pleadings, there is no doubt that performance of these acts should have been shown, and if the filing of the duplicate of the certificate of incorporation is to be regarded as one of them, the court below properly held that the existence of the corporation had not been established. But we do not see upon what principle such a construction of the statute is admissible. It is certainly not justified by the natural and ordinary import of the language used, which must furnish the rule of construction, unless a

contrary intention clearly appear. Section 122 of the act provides, as we have seen, for the filing of a certificate with the clerk, and a duplicate with the secretary of state; but section 123 declares that when the certificate shall be filed, the persons executing the same, and their successors, shall be a body politic and corporate. The intention of the legislature clearly was, that so far as individuals are concerned, the corporation should acquire a valid legal existence upon the filing of the certificate. The filing of the duplicate is exclusively a matter between the corporation and the state. The rights and privileges conferred by the statute vest in the corporation upon the filing of the certificate, and can be divested only by a direct proceeding for that purpose. If the duplicate has not been filed, the assumption of corporate powers amounts simply to a usurpation of the sovereign rights of the state, the remedy for which rests with the state alone.

Judgment reversed, and cause remanded for a new trial.

FIELD, C. J., and BALDWIN, J., concurred.

CORPORATE EXISTENCE.—A grant or charter may be presumed from long-continued exercise of corporate powers; but to give rise to this presumption, the acts done must bear the impress of corporate acts; must be such as corporations are competent and individuals incompetent to perform: *Greene v. Dennis*, 16 Am. Dec. 58. A charter will be presumed to exist from long exercise of corporate rights, or from other circumstances: *Selma & T. R. R. Co. v. Tipton*, 39 Id. 344. Where a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favor of the legality of its existence: *Hagerstown T. R. Co. v. Creeger*, 9 Id. 495. Condition precedent required of corporation must be performed before the franchise vests: *People v. Kingston T. R. Co.*, 35 Id. 551. But it is sufficiently organized to bind subscription to the capital stock when the parties mentioned in the charter have, in pursuance of its terms, by written articles of association, organized themselves, and opened books of subscription: *Mitford etc. Co. v. Brush*, 36 Id. 78.

THE PRINCIPAL CASE IS CITED in *Harris v. McGregor*, 29 Cal. 124, to the point that there must be a substantial compliance with all the requirements of the statute, by persons seeking to become a body corporate, before the corporation can be considered *in esse*. Consequently, a certificate of incorporation which does not set forth the name of the city or town or county in which the principal place of business of the corporation is to be located, does not establish the existence of a corporation. It is also cited in *Spring Valley Water Works v. San Francisco*, 22 Id. 440, to the point that the failure to file a duplicate of the articles of association with the secretary of state is not a fatal defect.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

LITCHFIELD'S APPEAL.

[28 CONNECTICUT, 127.]

NOTICE OF INSTITUTION OR PENDENCY OF SUIT, or appearance, which pre-supposes notice, is an indispensable prerequisite to the rendition of any judgment which the courts of another state are bound to recognize as conclusive. Without such service or appearance, the court obtains no jurisdiction.

SERVICE OF PROCESS UPON PERSON OF INSANE DEFENDANT who is under a conservator imposes upon him no obligation, and confers no jurisdiction on the court.

IN EQUITY, WHATEVER IS SUFFICIENT TO PUT PARTY UPON INQUIRY is sufficient to charge him with notice of facts which due inquiry would have elicited; so where such party is chargeable with knowledge of a decedent's insanity and incapacity, of his abundant property within the state, and of his subjection there to the guardianship of a conservator, these facts are sufficient to put such party upon inquiry, and to justify equity in restraining the enforcement of a judgment not impeachable at law.

EQUITY WILL RESTRAIN ENFORCEMENT OF JUDGMENT not impeachable at law when such judgment has been obtained by fraud, accident, or mistake.

WHILE EQUITY WILL RESTRAIN ENFORCEMENT OF INEQUITABLE JUDGMENT, it will enforce the payment by the judgment debtor of a debt justly due by him to the creditor.

APPEAL from commissioner's report on the estate of Ives, deceased, which report disallowed the appellant's claim. The case was referred to an auditor, who reported specially as to the facts, from which it appears that Ives was a resident of and died in Connecticut, in January, 1856. Appellants, residents of New York, brought suit against deceased in Massachusetts, served him with process, and obtained judgment and costs, by default, for nine hundred and fifty-eight dollars and eighty-two cents. This judgment was rendered in 1854, and

in 1855 appellants brought debt on the judgment, in Connecticut, caused the real estate belonging to Ives in the latter state to be attached, and served him with process. It also appeared that said suit was pending at the time of Ives's death. The auditor found that the account upon which the judgment was rendered was for certain casks sold by appellants to Ives, and for which he gave three notes, neither of which had been paid at the time of the rendition of said judgment. It also appeared that he had had the benefit of the casks, and that he purchased them for a fair price; that they were attached and sold in pursuance of said judgment, and that the proceeds of the sale (one hundred and seventy dollars) was indorsed on the execution; but it also appeared that Ives had paid the appellants fifty dollars before the judgment was rendered, and that this had not been deducted therefrom. The appellees claimed, and proved against appellants' objection, that the judgment was invalid, and that the account was not justly due, for the reason that Ives, during the time in which the transaction above mentioned took place, was insane, incompetent, and unable to understand his rights in court, and that during such time he was under the charge of a conservator; but it was also shown that Ives was possessed of enough intelligence to understand the business of buying and selling casks, and at the time that he made the contract with appellants did understand the nature of such contract; that outside of this business he was totally incapacitated by reason of his insanity, and that at the time that said judgment was rendered against him he had no understanding of the rights and duties of a party to a suit, and that no guardian *ad litem* was appointed for him. The auditor's report also showed that at the time suit was originally brought, appellants had knowledge of the insanity of Ives, and that he was under the charge of a conservator, although they were ignorant of these facts at the time when the transaction took place between them. The auditor found that if the judgment was allowed, with costs, the amount due the appellants was nine hundred and eighty-nine dollars and thirteen cents; that if the judgment was disallowed, and the account allowed, then the amount due was nine hundred and nine dollars and thirty-five cents. Upon the above facts, the question as to what judgment should be given was reserved for the determination of this court.

Hungerford and Cone, for the appellants.

T. G. and C. E. Perkins, for the appellees.

By Court, SANFORD, J. The original suit in which the Massachusetts judgment was rendered was commenced by the attachment of the defendant's property found within the jurisdiction of the court, and by the service of the process upon his person; and so far as concerns the property attached and its appropriation toward the payment of the plaintiff's debt, the validity of that judgment and its sufficiency to justify that appropriation are not denied. But it is claimed by the appellees that, as against the defendant's person and his property in this state, that judgment is invalid, and ought not to be enforced.

It seems now to be generally conceded that the records and judicial proceedings referred to in the fourth article of the federal constitution are those only to which the defendant has been made a party by personal service of the process, or has become such by his voluntary appearance in the court. Without such service or appearance, the court obtains no jurisdiction of the defendant's person. As to him, its proceedings are *ex parte*, its record is no record, and its judgment is, in another state at any rate, entitled to no "faith or credit," and ought to have no "effect." And the right of the party against whom such judgment is sought to be enforced, to show such want of jurisdiction, is also generally conceded. Notice of the institution or pendency of the suit, or an appearance which presupposes notice, is an indispensable prerequisite to the rendition of any judgment which the courts of another state are, under the constitution and laws of the United States, bound to recognize as conclusive on the defendant, and accordingly enforce: *Kibbe v. Kibbe*, Kirby, 119; *Aldrich v. Kinney*, 4 Conn. 380 [10 Am. Dec. 151]; *Denison v. Hyde*, 6 Id. 516; *Wood v. Watkinson*, 17 Id. 500 [44 Am. Dec. 562]; *Borden v. Fitch*, 15 Johns. 141 [8 Am. Dec. 225]; *Noyes v. Butler*, 6 Barb. 616; *Starbuck v. Murray*, 5 Wend. 148 [21 Am. Dec. 172]; *Dobson v. Pearce*, 12 N. Y. 156 [62 Am. Dec. 152]; *Pendleton v. Weed*, 17 Id. 73; *McElmoyle v. Cohen*, 13 Pet. 324; *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88].

In the case before us, the service of the process was made in fact upon the person of the defendant in the suit, but he was then insane—incapable of transacting ordinary business—and "had no adequate understanding of his rights and duties as a party to a cause in court." He did not appear, no guardian was appointed for him, and no one appeared in his behalf. Of what avail could be the service of legal process upon the person of such an individual? Like service of legal process

upon an infant three years old, or upon an idiot, a nativitate, it was but an idle ceremony, which, as it conveyed to the individual no adequate idea of its import or effect, ought, in reason, to have imposed upon him no obligation, and conferred no jurisdiction on the court.

But if the judgment was not impeachable at law, a court of equity would have restrained the appellants from its enforcement. The appellants knew or at any rate are chargeable with knowledge of the decedent's insanity and incapacity, as well as his abundant property in this state, and of his subjection here to the guardianship of a conservator; for whatever is sufficient to put a party upon inquiry is, in equity, sufficient to charge him with notice of the facts which due inquiry would have elicited; and the appellants had made to the decedent at least three distinct sales of personal property of considerable value upon credit; their debt of nearly nine hundred dollars had been due, and remained unpaid for an entire year before the commencement of their suit; and at that time they knew that the decedent had a conservator and was claimed to be insane. These are facts quite sufficient to put the appellants upon inquiry; and indeed, it is almost as difficult to resist the conclusion that they had in fact ascertained the truth found by the auditor in relation to the incapacity and pecuniary ability of the decedent, as it is to avoid the application of the principle alluded to. It is unnecessary to pronounce the procurement of the original judgment fraudulent. It is enough that it was taken for fifty dollars more than was then justly due to the appellants, whether by fraud, accident, or mistake, is immaterial.

The attempt to enforce such a judgment by suit, knowing the circumstances under which it was obtained, was inequitable. If, as the appellants claim, that judgment was one by which the decedent was conclusively bound at law, a case was presented for the application of the general rule cited and approved by Hinman, J., in giving the opinion of this court in the case of *Pearce v. Olney*, 20 Conn. 554, that "equity will interfere to restrain the use of an advantage gained in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice in all cases when such advantage has been gained by the fraud, accident, or mistake of the other party." See also *Carrington v. Holabird*, 17 Id. 530; *Truly v. Wanner*, 5 How. 141; 2 Story's Eq. Jur., sec. 887, and 2 Swan's Dig. 188.

As therefore a court of equity would have enjoined against

the prosecution of the suit upon the Massachusetts judgment, and as commissioners, in regard to the allowance and rejection of claims against insolvent estates of deceased persons, exercise, in effect, the powers and apply the principles which govern courts of equity as well as courts of law, the judgment as a ground of claim in favor of the appellants was properly rejected.

But equity affords its aid only upon the terms and to the extent of doing exact justice between the parties. While, therefore, for the reasons suggested, it would restrain the enforcement of the judgment, it would require the payment by the judgment debtor of the debt justly due from him to the creditor. And in regard to that, it is found by the auditor that, at the time the original debt was contracted, the decedent, in all the transactions between him and the appellants upon which their account is founded, was able to understand and did understand the contracts which he made, that the property was sold to him at fair prices, and that he had the benefit of it all, and that the account is justly due to the appellants. Justice, therefore, requires that the original account and interest, deducting therefrom the net proceeds of the property attached at New Bedford, and the fifty dollars paid after the commencement of the original suit and before the judgment was rendered should be allowed to the appellants, but that the judgment and the costs of the suit thereon should be rejected; and in this we think the justice and the law of the case coincide.

The superior court therefore should be advised that the claim of the appellants for the amount of their judgment against the decedent, James Ives, and the costs of their suit thereon, ought to be rejected, but that the amount due on their account, as found by the auditor, to wit, the sum of nine hundred and nine dollars and thirty-five cents, with additional interest, amounting in all to nine hundred and forty-three dollars and seventy cents, ought to be allowed to the appellants against the estate of said Ives.

In this opinion the other judges concurred.

JUDGMENT AGAINST PARTY WITHOUT NOTICE OR APPEARANCE is void: *Shaefer v. Gates*, 38 Am. Dec. 164; *Flint River Steamboat Co. v. Roberts*, 48 Id. 178; *Flint River Steamboat Co. v. Foster*, Id. 248; *Jones v. Commercial Bank*, 35 Id. 419; *Keaton v. Banks*, 51 Id. 393, and note 395.

WHATEVER PUTS PARTY ON INQUIRY AMOUNTS TO NOTICE, provided knowledge of the requisite fact would be obtained by the exercise of ordinary dili-

gence: *Wilson v. McCullough*, 62 Am. Dec. 347, and note 352; see also *Heed v. Fahrenstock*, 44 Id. 147, note 152.

CHANCERY MAY RELIEVE AGAINST JUDGMENTS obtained by fraud, accident, surprise, or mistake: *Bank of Tennessee v. Patterson*, 47 Am. Dec. 618; *Emerson v. Udall*, 37 Id. 604; *Pearce v. Chastain*, 46 Id. 423; *Lockwood v. Mitchell*, 53 Id. 438, and notes to these cases; and *Hampstead v. Watkins*, 48 Id. 714.

MARSHALL v. TRUMBULL.

[28 CONNECTICUT, 182.]

RESERVATION OR EXCEPTION IN DEED VOID.—A and B were co-tenants of a passway; A sold his portion thereof, and in the deed attempted to reserve to himself the right to pass and repass through said passway into and upon adjoining land: *Held*, that such reservation or exception was void, and that the other co-tenant might at all times so treat it.

TENANT IN COMMON CAN NEITHER SELL NOR INCUMBER any part of the estate by metes and bounds, so as to prevent such division or distribution as would give the other co-tenants an unincumbered title to the part sold or incumbered. This rule applies to a passway held in co-tenancy.

ONLY WAY IN WHICH CO-TENANT CAN RETAIN any portion of or a right in a passway held in co-tenancy, after conveying away a portion of it, is to convey not his whole undivided half, but some aliquot part or portion of it. Thus reserving in himself a right in the whole not inconsistent with the rights of his co-tenants while it remained common property.

THE facts appear in the opinion.

Goodman and W. N. Hawley, for the plaintiff.

F. F. and H. C. Robinson, for the defendant.

By Court, HINMAN, J. Previous to the tenth of March, 1847, the plaintiff was the owner of an undivided half of a gangway leading to a lot owned by him in severalty, and to a lot belonging to the heirs of Michael Marshall, the other half of said gangway being owned by said heirs. These lots, with the gangway, had all been common property, and on a division, under a decree of the superior court, the gangway was to be and remain a mutual gangway, for the joint accommodation of the respective owners of said lots, and was owned by them as tenants in common. On said tenth of March the plaintiff sold his lot and his share of the gangway, but in his deed he attempted to reserve to himself a right to pass and repass through said gangway to a wood-house standing on another lot adjoining it.

That reservation, together with the clause of the deed describing the share of the gangway intended to be conveyed, is in these words: "Also one undivided half, as tenant in common with the heirs of Michael Marshall, in the gangway lying eastwardly of the land of the heirs of said Michael Marshall,

reserving unto myself the right to pass and repass through said gangway to my wood-house." Treating this as an attempt to save from the operation of the deed a right of passway to and from the plaintiff's wood-house, it might, with more propriety perhaps, be called an exception (which according to Lord Coke, is ever of the thing granted, whereas a reservation is something newly created or reserved out of the land as rent); and the question is, whether it is of any validity.

Assuming that it would have been good had the plaintiff owned in fee the whole gangway, instead of an undivided portion of it, it resolves itself into a question whether a tenant in common can create such an easement in the common estate. In other words, could the plaintiff, before he deeded his interest in the gangway, have conveyed such an easement to a stranger? or had his deed contained no such clause of exception or reservation, could his grantee, after he had become a tenant in common with the Marshall heirs, have reconveyed to the plaintiff the right which he now claims?

As the title to the gangway was in the plaintiff and the Marshall heirs as tenants in common, it was, of course, subject to all the incidents of such an estate; and the fact that it was to remain open for the accommodation of the two lots did not deprive it of them. The ownership of the adjoining lots might, at any time, be so shifted that it would no longer be needed as a passway, and then, if not before, a court would, on the application of either party, cause it to be divided, so that each proprietor should possess his land in severalty; and in theory at least, being common property, it is at all times subject to be divided and apated between the owners, and must, therefore, remain subject to the same rules in respect to the power of one of the tenants in common, to convey away any portion of the common estate, that any other real estate held by tenants in common is subject to. Now, it is well settled that one tenant in common can neither sell nor incumber any part of the estate by metes and bounds so as to prevent such a division or distribution as would give the other tenants in common an unincumbered title to the part thus sold or incumbered: *Griswold v. Johnson*, 5 Conn. 363; *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22]; *Merrill v. Berkshire*, 11 Pick. 269. Deeds and other conveyances of such property are not merely inoperative against the rights of the other tenants, when a partition is made, but they are, as remarked by Judge Hosmer, undoubtedly void, and the other co-tenants may at all times so treat them. It follows,

then, that unless this reservation or exception is, in fact, a reservation of a right in the whole passway, that is, a reservation of some aliquot portion of the plaintiff's interest in it, it must, according to this principle, be deemed to be void. But the right of a passway in or through a piece of land is, in its very nature, to be exercised upon a specific part of the land, and it is impossible to conceive, in this case, of a right in the plaintiff to pass to and from his wood-house without interrupting and infringing upon the rights of the proprietor who might have that portion of the gangway which adjoins the wood-house aperted and set to him. Thus the effect of the attempted reservation of the passway, if valid, would be the same as the granting or deeding to another of that part of the gangway which does not adjoin the wood-house by metes and bounds, and retaining the other portion with the view of retaining a passway to it, which would be but an attempt to make partition without the co-operation of the other co-tenants, and therefore cannot be done. Indeed, the only way in which the plaintiff could, consistently with the rules of law, have retained any portion of or right in the gangway, after conveying away a portion of it, would have been to have conveyed to his grantee, not his whole undivided half, but some aliquot part or portion of it; and thus he would have left remaining in himself, instead of a right to go over it to his wood-house, a right in the whole, which would give him the right to use any proper part of it for any purpose, not inconsistent with the rights of his co-tenants, while it remained common property. But whether this would have given him the right to use it for the mere purpose of going to his wood-house is a question which we need not now discuss. The views herein expressed will be found more fully considered and acted upon in the late case of *Adam v. Briggs Iron Co.*, 7 Cush. 361, to which we refer for a full exposition of the law on this subject.

The superior court having ruled in conformity to the views here expressed, a new trial is not advised.

In this opinion the other judges concurred.

ONE TENANT IN COMMON CANNOT SUBJECT COMMON PROPERTY TO PARTICULAR SERVITUDES affecting the rights of his co-tenants: *Hutchinson v. Chase*, 63 Am. Dec. 645.

CONVEYANCE BY METES AND BOUNDS of a portion of the common estate by a co-tenant is, according to some of the authorities, void, and not merely voidable at the election of the other co-tenants: *Duncan v. Sylvester*, 41 Am. Dec. 400; *Smith v. Benson*, 31 Id. 614; *Bigelow v. Topliff*, 60 Id. 264; *Daniels v.*

Brown, 69 Id. 505, and notes to these cases; *Hartford and Salisbury Ore Co. v. Miller*, 41 Conn. 129-131; and what a co-tenant cannot do directly by express grant he cannot do indirectly by implied grant: *Woodworth v. Raymond*, 51 Id. 77. Both of the latter cases cite the principal case. But see *Freeman on Co-tenancy and Partition*, secs. 199-207.

TENANT IN COMMON MAY CONVEY ALIQUOT PORTION of his entire interest: *Smith v. Benson*, 31 Am. Dec. 614, and note 617.

CO-TENANT CANNOT CONVEY BY DEED WHOLE OF ESTATE held in common, or the whole of a distinct portion, nor can he give a valid release for injuries done thereto. As against the other co-tenants, such deed is inoperative and void: *Murray v. Haverly*, 70 Ill. 320, citing the principal case.

UPTON v. HUBBARD.

[28 CONNECTICUT, 274.]

ENGLISH RULE IS, THAT FOREIGN ASSIGNEE under a bankrupt law can sue as if he were an assignee under the law of England.

AMERICAN RULE IS, TO CLASS FOREIGN ASSIGNEES with foreign executors, administrators, guardians, etc., who, having title, right, or power, by mere operation of law, have it co-extensive only with the sovereignty of the state which gives it. Connecticut statute of 1854 has not changed this rule, nor does it authorize foreign assignees to sue in their own names by way of interpleader or otherwise.

ALTHOUGH FOREIGN ASSIGNEE MAY BE ALLOWED TO SUE IN HIS OWN NAME in the courts of Connecticut as a mere act of courtesy, when there is no adverse interest to be affected, yet it will never be allowed for the purpose of defeating creditors, no matter where they reside, and especially if their attachments precede the assignment.

STATUTE REPRESENTATIVE DOES NOT UNIVERSALLY SUCCEED by legal operation to the decedent's title and possession, but as such he takes the property only which is within the state. If he wishes to obtain property which is abroad, he must do so by ancillary appointment. Yet if he acquire such property without such appointment, he may hold it subject to the interposition and objection of creditors and legatees.

LICENSE OR POWER CONFERRED BY STATUTE is only co-extensive with the sovereignty from which it emanates.

ATTACHING CREDITORS WHO HAVE ACQUIRED VALID LIEN in Connecticut, upon a debt due a Massachusetts insolvent, may enforce their lien by prosecuting their claims to judgment and execution; notwithstanding the subsequent discharge of the insolvent under the bankrupt law of Massachusetts.

QUALIFIED JUDGMENT MAY BE HAD and execution issue against property attached by creditors in Connecticut, even if a personal judgment against a foreign insolvent is prevented by his discharge under bankrupt proceedings instituted in another state.

BILL in equity by Upton and others, as assignees in insolvency, under the Massachusetts law, of the estate of one Mason, a resident of said state, and sued as such, and against one

Hubbard, a debtor of Mason's when he went into insolvency; and also against other creditors of said Mason, residents of said state, and who had sued in Connecticut and attached the debt due by Hubbard to Mason by foreign attachment. These suits were pending when the bill was brought, the attachments having been served November 4, 1857. On November 8, 1857, Mason filed a petition in insolvency in the county court of Massachusetts, and prayed the benefit of the acts of that state. Under the petition and laws of said state, a creditors' meeting was held, at which plaintiffs were chosen as assignees of the insolvent's estate. Thereupon the judge of the insolvent court, in pursuance of law, conveyed to plaintiffs, as assignees, all the real and personal property of Mason, at the same time granting the insolvent an absolute discharge from all debts which had then or might thereafter be proved against him, under the insolvent law of that state, founded on contracts made or to be performed within said state. This suit was instituted under the Connecticut act of 1854, providing that whenever any party indebted to another shall refuse to pay the debt because of its being attached in his hands by foreign attachment, the party to whom the refusal is made may institute suit in equity, in the nature of a bill of interpleader, and the court in such suit is empowered to determine to whom the debt is due, and may order what disposition shall be made of the same, and may make any other order necessary to do justice between the parties. There was a demurrer to the bill, which was overruled, and the allegations therein contained found to be true. It was decreed that the attachment suits be discontinued, and that Hubbard pay the costs thereof out of the funds of Mason in his hands; that the amount found by the court, together with the balance of the debt due, be paid to plaintiffs. From this decree there is error to this court.

Tyler and C. J. Reed, of Massachusetts, for the plaintiffs in error.

T. C. Perkins and B. Sanford, of Massachusetts, for the defendants in error.

By Court, ELLSWORTH, J. We are all satisfied that there is error in the judgment of the superior court; but as this does not necessarily make an end of the case, it may be well for us to state our views upon the questions so ably and elaborately argued before us.

A majority of the court are of opinion that the petitioners, as foreign assignees, cannot of right maintain their suit against these respondents, either on principles of the common law or under the provisions of the statute of 1854.

We suppose, however, that in the English courts, certainly from the time of the American revolution, the course of decisions is well-nigh uniform, that a foreign assignee under a bankrupt law can sue in their courts as if he was assignee under their own law. They hold this principle on the ground that a general assignment under the statute is equivalent to a special assignment by the party, and then, applying the doctrine of international law, that what constitutes a transfer in the place of the owner's residence constitutes a good transfer everywhere, they make a good and perfect legal title in the assignee. But the courts in this country have not given their assent to this course of argument, though some of our jurists think it is the correct one. The law of the American courts is generally quite otherwise, as an absolute doctrine of the law. They seem to class foreign assignees with foreign executors, administrators, guardians, conservators, and selectmen, who, having title, right, or power by mere operation of law, have it co-extensive only with the sovereignty of the state which gives it. Hence it follows that such title, right, and power have no existence in another sovereignty, and are not of course recognized, though they are admitted in certain cases as a matter of courtesy. This doctrine is familiar to every lawyer in the case of foreign executors and administrators, and we perceive no reason why it is not equally true as to foreign assignees. They are mere agents of the law—instruments of the government to settle the affairs of a deceased or bankrupt debtor. And in our view, there is essentially no difference whether, in consequence of an act of bankruptcy, as in England, the bankrupt's estate is forced from him, or he sets the law in motion himself by a conveyance in bankruptcy in the first instance. It is a local governmental proceeding.

This doctrine has often been recognized and concurred in in this state, and we believe has never been called in question. In the case of *Taylor v. Geary*, Kirby, 313, our highest court held, upon solemn argument, that the commission of bankruptcy against the defendants in England did not secure their effects here, but that they remained as before, transferable by them, and open to the attachment of their creditors, as well British as American. The same general doctrine is held in

the case of *Riley v. Riley*, 3 Day, 74 [3 Am. Dec. 260]. Our courts have never, so far as we know, recognized the absolute right of foreign assignees to institute suits here in their own names, though it perhaps may be allowed as a mere act of courtesy, as has often been done elsewhere, if there be no adverse interest to be affected; but it is never allowed to defeat creditors, be the place of their residence where it may; and especially not if their attachments precede the assignment.

Among the most important cases on this subject, we mention those of *Abraham v. Plestoro*, 3 Wend. 550 [20 Am. Dec. 738]; *Hoyt v. Thompson*, 5 N. Y. 320; *Booth v. Clark*, 17 How. 338; and *Milne v. Moreton*, 6 Binn. 353 [6 Am. Dec. 466]; in which cases the subject is examined with great learning and ability, and all the cases in the books are referred to. The main doctrine will be found to be much as laid down in the case in *Kirby*, before mentioned, with this addition, perhaps, that by mere courtesy foreign assignees are allowed to sue in their own names, where there is no attachment, lien, or claim adverse to the assignment.

Even in the English view of a transfer by bankruptcy, it is not easy to see how a foreign assignee really sues in his foreign representative character, since, in that view, the assignment is held to be a transfer as much as if it was a private sale, in which latter case we know the vendee gets a personal title the world over. An executor gets such a title to chattels which are within the state of the decedent's domicile, so that they can, in case of their being stolen or lost, be reclaimed by the executor as his own property, and in his own name. The domicile of a person in life, wherever he is, by a legal fiction draws the property to himself, so that he is said to be possessed of it there; but this is not true when the owner dies, having no longer any place of domicile. A statute representative does not universally succeed by legal operation to his title and possession, but as such he takes the property only which is within the state. If he is the principal representative; such as the principal executor or administrator, or is a legal assignee, and wishes to obtain the property, which is abroad, he must go there, and by an ancillary administration or appointment get authority, or employ some one else to do so in his own name, and remit what he receives to the principal executor, etc. If, indeed, the principal executor or the assignee go there himself, and without acquiring local authority collect a debt or receives property belonging to the estate, it is well

enough, we suppose, if the creditors or legatees there do not interpose and object; for in such a case, the same end is accomplished which could be reached through an ancillary administration, and the law does not require any unnecessary formality and expense, but looks at the substance of the thing: *Holcomb v. Phelps*, 16 Conn. 127, 133; *Lawrence v. Kitteridge*, 21 Id. 582 [56 Am. Dec. 385]; Story's Conf. L., sec. 404.

We cannot think it necessary to cite cases to show that, in strictness, a mere license or power conferred by statute is only co-extensive with the sovereignty from which the license or power emanates. In England, administration may be granted in the province of Canterbury or in that of York, or it may be granted in certain jurisdictions, denominated "royal peculiars," like the city of London, which are entirely independent of the ecclesiastical courts, and administration can be taken out only when there are *bona notabilia*: 1 Williams on Executors, 258. If it be taken out elsewhere, it is utterly void. Movables are assets where they happen to be at the decease of the owner; chattels real, where the land is situate; judgments and the like, where the records are kept; bonds, etc., where the deeds are kept; and simple contracts, including notes and bills, where the debtors reside: Story's Conf. L., sec. 514.

We will not dwell longer on the point, and will only remark, in leaving it, that in no view of the case will a bill of interpleader lie at the common law, for such a bill lies only in behalf and on the application of the stake-holder, while the present case is not of that character, nor does it resemble such a case in any respect whatever.

Let us then inquire if the statute of 1854 affords relief. Does that authorize foreign assignees to sue in their own names by way of interpleader or otherwise? We have already said that a majority of the court think that it does not; though the language of the act, if construed literally, is broad enough for this purpose. Those of us who entertain this opinion believe that the legislature, in passing the act, had nothing of this kind in view, and think that we should not be justified in giving the act the broad construction claimed by the plaintiff's counsel. Nor is there any necessity for resorting to such a construction of the act, for at all times the equitable owner of a debt which has been attached has the right to show his title to it in his defense on the *scire facias*: *Barber v. Hartford Bank*, 9 Conn. 407. We conceive the object of this statute to be to give a summary remedy in cases where the plaintiff comes into court

and has a right to come, as in other instances at common law. We cannot believe for one moment that the legislature, by this simple act of ordinary legislation, the object and aim of which are perfectly manifest, intended to repeal a great principle of international law, and open the courts to parties who had no standing or capacity in them before, whether at law or equity. But even were it otherwise doubtful, the circumstance that these persons come here to prosecute without the necessity of giving bonds for a faithful execution of their trust would have weight with us in determining the construction of the statute. Without such security for their rights, our citizens might well complain that property should be allowed to be carried out of this jurisdiction, and beyond their reach, and not only so, but there administered in a foreign state, under laws different from our own.

But there is another equally serious, and in our judgment fatal, objection to this decree. The attaching creditors, by pursuing the steps of our law, certainly acquired a lien upon the debt due from Mr. Hubbard which no foreign proceedings under the bankrupt law of Massachusetts can destroy or impair, without allowing an extraterritorial effect to the law of that state in conferring title upon the assignees, which we cannot do. The right of the attaching creditors to the lien obtained by their attachments being good here must remain good, and we see not why they may not enforce that lien by prosecuting their suits to judgment and execution, which is the only possible mode of realizing anything from the lien known to our law.

We suppose we have no occasion at this time, and perhaps ought not, to proceed further in expressing our views upon the case; for we do not know, even if the cases are re-entered in the superior court, that the plaintiffs will ever recover judgment therein. It is most earnestly contended that they cannot, and that, if they do not, of course all controversy about the title to the debt due from Mr. Hubbard is at an end, and that even if judgment shall be recovered, in the end it will amount to nothing substantial. We are not prepared to say how this may be, and what would be the effect of the discharge of Mason from his debts in Massachusetts if pleaded here, and especially upon this lien, which is good in Connecticut, and to reach which it is said a conditional execution may be issued.

It seems to us that if Mason himself shall appear in our court and answer to these attachment suits, or if the assignees shall appear for him and prevent a recovery, it will put an end

to his personal liability; but if judgment against him personally is prevented on the ground of his discharge in Massachusetts under proceedings in bankruptcy there, then, as is claimed, and we think with much force, a qualified judgment may be had, and execution issued against the property attached. Several cases where this has been done are cited by counsel, one in the circuit court of the United States in this circuit, that arose under the old bankrupt law of the United States, which contained a clause excepting liens, etc., and some others, more especially those of *Davenport v. Tilton*, 10 Met. 320, *Ives v. Sturgis*, 12 Id. 463, and *Peck v. Jenness*, 7 How. 618.

And here again another question arises. Suppose the lien can be preserved to the attaching creditors and converted into money as above suggested, will or will not these creditors be held accountable for the money in Massachusetts, where all the parties reside, to the assignees of Mason? Or will the lien, being good in Connecticut, the *situs* of the property in question, have precedence everywhere? We leave the question with these suggestions, for further inquiry here or elsewhere, as the parties before us shall have occasion to make it in enforcing their rights.

There is manifest error in the decree below.

In this decision the other judges concurred; SANFORD, J., with some doubt, however, whether the suit ought not to be entertained under the statute of 1854.

Judgment reversed.

RIGHT OF FOREIGN ASSIGNEE TO SUE: See *Bird v. Caritat*, 3 Am. Dec. 433, and note 436; *Robinson v. Crowder*, 17 Id. 762, note 769; and see also the principal case distinguished on this point in *Cooke v. Town of Orange*, 43 Conn. 410.

EXECUTOR OR ADMINISTRATOR CAN ADMINISTER only upon property situate within the state from whose courts he derives his powers: *Packwood's Succession*, 41 Am. Dec. 341; S. C., 43 Id. 230, and note 239; *Salmond v. Price*, 42 Id. 204; *Fletcher v. Sanders*, 32 Id. 96, and note 106, 107. Property belonging to the decedent in another state can only be collected by an administrator appointed there: *Abbott v. Coburn*, 67 Id. 735, and note 740. But in the absence of an ancillary administration, a principal administrator or executor can collect or remove property or debts due or situate in another state if voluntarily paid or given up: *Marcy v. Marcy*, 32 Conn. 322, citing the principal case. On this latter point, see *Vroom v. Van Horne*, 42 Am. Dec. 94, and note 100.

DISCHARGE IN INSOLVENCY DOES NOT AFFECT NON-RESIDENTS: *Savage v. Marsh*, 43 Am. Dec. 451; *Larrabee v. Talbot*, 46 Id. 637; *Tebbetts v. Pickering*, 51 Id. 48; *Nesley v. Merriam*, 54 Id. 721, and citations in notes to these cases.

JUDGMENT AGAINST INSOLVENT AFTER DISCHARGE, EFFECT OF: See *Woodbury v. Perkins*, 51 Am. Dec. 51; *Coburn v. Spence*, 50 Id. 140; *Pike v. McDonald*, 54 Id. 579; *Clark v. Rowling*, 53 Id. 290, and extended note thereto 296-300.

LAWS OF STATE HAVE NO LEGAL EFFECT BEYOND LIMITS OF HER TERRITORY: *Smith v. Godfrey*, 61 Am. Dec. 617; *Paine v. Lester*, 44 Conn. 203; consequently local law of New Jersey cannot vest property in a receiver, the property being in Connecticut: *Pond v. Cooke*, 45 Id. 132; and the giving effect to the laws of a sister state or foreign country in transfers of personal property within their limits is an act of comity, and not a recognition of a right. This comity will be extended when there is no reason to the contrary, and no interests of the citizens of either of the states seeking the protection of the law are injuriously affected by such recognition: *Paine v. Lester*, 44 Id. 203. The Connecticut cases cite the principal case. The courts of one state will not enforce the laws of another when they clash with the rights of citizens of the former: *Kanaga v. Taylor*, 70 Am. Dec. 62; *McLean v. Hardin*, 69 Id. 740, and note 743.

KEARNEY v. FARRELL.

[28 CONNECTICUT, 317.]

OPINIONS OF WITNESSES WHO TESTIFY THAT THEY ARE ACQUAINTED with the effect which privies and sties have upon the air about them, that they have examined the premises as to their nature and condition, are competent evidence as to whether or not such privies and sties are nuisances, and whether they must or would make plaintiff's house uncomfortable.

PROOF OF DECLARATIONS OF DECEASED WIFE is competent to show that she complained of offensive smells from nuisances while suffering from them, and during the time mentioned in the declaration; the witnesses testifying that the offensive smells were also perceived by them.

PARTY MAY RECOVER NOT ONLY FOR INJURIES DONE to himself by a nuisance, but also for those done to his family, and when the declaration contains averments of such injuries, evidence to prove them is admissible.

PARTY HAS RIGHT TO HAVE JURY PASS UPON ALL ALLEGATIONS contained in the declaration, and he is entitled to their verdict if he sustains by his proof any of the allegations showing a cause of action.

THE opinion contains the facts.

Graves, in support of the motion for a new trial.

Catlin and Barbour, contra.

By Court, BUTLER, J. Three questions were raised in this case, and they will be considered in the order in which they stand upon the record.

The defendant complains, in the first place, that the court erred in admitting the opinion of the witnesses, although connected with the facts on which the opinion was based, upon the question whether the privies and sties described in the declaration were or were not nuisances, and so nuisances that they

must and would make the plaintiff's house uncomfortable. The witnesses testified that they were acquainted with the effects which privies and sties have upon the air about them. It is obvious, then, that if the subject-matter was of such a character that they could become experts, they were experts, and as such properly permitted to testify. And if such was not the character of the subject-matter, yet we are clearly of opinion that the testimony was admissible, within the principles sanctioned by this court in the case of *Porter v. Pequonnock Mfg. Co.*, 17 Conn. 249. In that case, individuals who, by their personal observation, had acquired a knowledge of the character of the stream, and also of the dam erected thereon, were permitted to testify whether, in their opinion, the dam was sufficiently strong to withstand the stream; not on the ground that they were technically experts, acquainted professionally with the force of water in streams, and the strength of dam required to resist it, but on the ground that, as practical and observing men, having knowledge of facts which such men would observe and understand, their judgment or opinion, in connection with the facts so observed, were admissible. And the court well said, that to preclude them from giving their opinion on the subject in connection with the facts testified to by them would close an ordinary and important avenue to the truth. So here, the witnesses were acquainted with the effects which privies and sties have upon the air about them. They examined the premises, and testified as to their nature and condition. Such knowledge and such facts are within the reach and observation of ordinary men; and an examination of the premises by professional men as experts, and an opinion from them in connection with the facts, would have been of no more value than that of the witnesses called. Opinion as to the future and permanent offensiveness of the privy and sty was important and admissible. It was, therefore, clearly proper that the testimony should be received. Those witnesses were as well qualified to judge whether the privy and pig-sty were and would continue to be offensive or not, and whether so offensive as to render the plaintiff's house uncomfortable, as any witnesses could be, and as the witnesses in the case named were to judge of the rapidity and force of the stream, and of the probability that it would force away the dam which was erected across it: See also *Cottrill v. Myrick*, 12 Me. 222.

The record shows, in the second place, that the plaintiff offered witnesses to prove that his wife (deceased at the time of

the trial) complained of the offensive smells from the nuisances, while suffering from them and during the time named in the declaration; the witnesses testifying that the offensive smells were also perceived by them. This evidence was objected to. The court ruled that the plaintiff might show that complaint was made while the party was suffering from the stench, but excluded the testimony so far as claimed for any other purpose.

A man may recover, not only for injuries done to himself by a nuisance, but for those done to his family. In this case, the declaration contains an averment of annoyance to the family, and evidence to prove that averment was admissible. The motion shows that the wife was suffering from the nuisances. It is difficult to perceive why the complaint of a person suffering from a nuisance may not be received as an expression of bodily or mental feeling, and as original evidence, as well as in any other case of annoyance or injury.

Whether the annoyance or injury were real or feigned was for the jury to determine, as in all other cases of suffering and complaint.

The defendant complains, in the third place, that he proved, or offered evidence to prove, that the privy was not a nuisance, and asked the court to charge the jury that if they so found, the verdict on the first count must be for the defendant. The court did not so charge, but instructed them that if they found either the privy or the sty to be a nuisance, they must find for the plaintiff on that count.

The claim of the plaintiff substantially is, that inasmuch as the sty was alleged to be a nuisance in both counts of the declaration, and the privy was alleged to be a nuisance in the first count only, he had a right, as a matter of law, to insist that the jury should not pass upon the allegations in the first count in relation to the sty, but as to that count should pass upon the privy alone, and regard no allegations in relation to the sty, excepting those contained in the second count.

This claim cannot be sustained. By the law of Connecticut, a jury may return a general verdict; and the plaintiff has a right to have them pass upon all the allegations in the declaration, and he is entitled to their verdict if he sustains by his proof any of the allegations showing a cause of action. The court had no power, therefore, to withdraw the allegations of the first count in relation to the sty from the consideration of the jury, and direct them to disregard those allegations. It would be a violation of all principle to do so in such a case.

And if the second count should be defective, so that judgment thereon might be arrested, and the court should tell the jury to return their verdict for the plaintiff if they found the sty to be a nuisance on the second count only, which was bad, and not on the first, which was good, they might thereby deprive the plaintiff of his verdict and do him a gross wrong. If the defendant desired to make a special issue, and have a special verdict in relation to the privy, he should have provided for it by his pleading, and not sought to obtain it by asking the court to direct the jury to disregard any proper or essential allegation in either count of the declaration. The end desired might also have been attained by a request to the court to inquire of the jury how they found in respect to the privy.

A new trial is not advised.

In this opinion the other judges concurred.

New trial not advised.

EVIDENCE OF WITNESSES NOT EXPERTS not admissible in prosecution for nuisance: *Luning v. State*, 52 Am. Dec. 153.

PARTY CAN RECOVER ONLY DAMAGES for an injury to property caused by nuisance: *Commissioners v. Wood*, 49 Am. Dec. 582.

ALL ISSUES OF FACT MUST BE LEFT TO JURY: *Scott v. Nichols*, 61 Am. Dec. 503, and note 508, upon which there is any evidence: *Fleming v. Marine Ins. Co.*, 33 Id. 33; *Bank of Pittsburgh v. Whitehead*, 36 Id. 186.

THE PRINCIPAL CASE IS CITED in *Sydleman v. Beckwith*, 43 Conn. 12, as being an instance upon the facts therein contained where the opinions of witnesses who are not experts, but simply common observers, in regard to appearances, facts, and conditions, are received in evidence.

SAVAGE v. DOOLEY.

[28 CONNECTICUT, 411.]

PRIOR OUTSTANDING MORTGAGE IN THIRD PARTY is only a pledge of land as security for a debt, and is to be regarded as a legal title in the mortgagee, or his assignee, only for the purpose of enforcing payment, and when another who has no interest in the debt attempts to set it up for his own benefit, this is in fraud of the purpose for which it was given.

PARTY WHO HAS NO RIGHTS, either as mortgagee or assignee, cannot set up an outstanding mortgage, in favor of some third person, to defeat the title of a plaintiff in ejectment who is a second mortgagor; and it can make no difference whether the party attempting to set up such mortgage has such interest in the land as will enable him to redeem, and thus acquire the rights of an assignee of the mortgage.

AS BETWEEN MORTGAGOR AND MORTGAGEE, the legal title is in the mortgagee, even in case of satisfied mortgages, provided they were not paid until after the expiration of the law day.

EJECTMENT. Dooley mortgaged the premises in dispute to the Hartford Savings Bank and Building Association. This mortgage was outstanding and unsatisfied at the time of this suit, and Dooley set up this outstanding title as a defense against Savage, to whom he had mortgaged the same land by warranty deed, excepting from the covenants therein the incumbrance of the prior mortgage above mentioned. Dooley, at the time that the mortgage was made to Savage, also gave another one to the firm of Foster & Co.; this latter mortgage containing the same exceptions as the one given to Savage, and each of the latter mortgages excepting the other from the incumbrance before mentioned. Both of the latter mortgages had been foreclosed, and the case on these facts was reserved for the advice of this court.

Lounsbury, for the plaintiff.

Wright, for the defendant.

By Court, HINMAN, J. We have not been able to distinguish this case from those of *Burr v. Spencer*, 26 Conn. 159 [68 Am. Dec. 379], and *Porter v. Seeley*, 13 Id. 564. It was said that the right of the defendant to redeem the bank mortgage gives him such an interest in the property as to preclude his being considered as a stranger to it, and that consequently he is authorized to take advantage of the mortgage to defeat the plaintiff's title; and is not estopped from doing so because that mortgage was declared to be outstanding in the plaintiff's deed, and was specially excepted from the covenant against incumbrances. The case of *Porter v. Seeley*, *supra*, was not decided upon the ground that the defendant was such a stranger to the mortgage attempted to be set up that he would not have the right to redeem it. That fact was not alluded to as having any bearing upon the decision, and the idea of the existence of an estoppel was expressly repudiated. On the contrary, the case was put upon the ground that a prior outstanding mortgage in some third person was not inconsistent with a legal title in the plaintiff; in other words, that such a mortgage, though in form a legal title, is, in substance, only a pledge of the land as a security for the debt, and is to be regarded as a legal title in the mortgagee, or his assignee, only for the purpose of enforcing payment. When used for this purpose, it is performing the office for which it was given; but when a third person who has no interest in the debt attempts to set it up for his own benefit, he is attempting to use it in fraud of the purpose for which it was given; and such a use,

if allowed, would enable a party in possession to keep possession of property to which he has no title, against the real owner, who has only pledged it as security for a debt. In the case of *Burr v. Spencer*, 26 Conn. 159 [68 Am. Dec. 379], we intended to recognize and follow the case of *Porter v. Seeley*, 13 Id. 564. And when it is said that an outstanding mortgage in a stranger cannot be set up to defeat a plaintiff, or show that he has no title, what is meant is, that one who has himself no rights, either as mortgagee or assignee, cannot set up a mortgage that may happen to be outstanding in favor of some third person. And whether he has such an interest in the land as will enable him to redeem, and thus acquire the rights of an assignee of the mortgage, can make no difference. Until he does redeem, he is as much a stranger to the mortgage as if he had no interest in the land.

There is no conflict between the cases of *Porter v. Seeley*, *supra*, and *Burr v. Spencer*, *supra*, and those of *Smith v. Vincent*, 15 Conn. 1 [38 Am. Dec. 52], and *Phelps v. Sage*, 2 Day, 151. In the last-named cases, the parties claimed directly under mortgages to themselves, and those cases, therefore, merely decide that as between the mortgagor and mortgagee the legal title is in the mortgagee, even in the case of satisfied mortgages, provided they were not paid until after the expiration of the law day. This doctrine in respect to satisfied mortgages may operate as a qualification of some of the reasoning of the court in *Porter v. Seeley*, *supra*, but is clearly consistent with the decision itself. It follows from what has been said that the defendant, who has no rights under the mortgage to the bank, cannot avail himself of that mortgage to defeat the plaintiff's title.

We therefore advise the superior court that the plaintiff is entitled to judgment.

In this opinion the other judges concurred.

Judgment for plaintiff advised.

MORTGAGE IS MERE SECURITY for the payment of a debt, and does not pass the title: *Duty v. Graham*, 62 Am. Dec. 534; *Peters v. Jonestown Bridge Co.*, 63 Id. 134; *McMillan v. Richards*, 70 Id. 655, and citations in notes to these cases; *Mills v. Shepard*, 30 Conn. 102, citing the principal case.

OUTSTANDING MORTGAGE TO STRANGER cannot be set up by the defendant in ejectment to show that the plaintiff has no legal title, or that his title is different from the one alleged: *Burr v. Spencer*, 68 Am. Dec. 379, and note 382; nor is a stranger permitted to take advantage of such mortgage, either as a cause of action or ground of defense: *Town of Clinton v. Town of Westbrook*, 38 Conn. 14, citing the principal case.

AS BETWEEN MORTGAGOR AND MORTGAGEE, the legal title is in the latter; *Smith v. Kelley*, 46 Am. Dec. 595, and note 597; *Waring v. Smyth*, 47 Id. 299. The estate becomes absolute in the mortgagee after condition broken, subject to redemption: *Frische v. Kramer*, Id. 368; see also notes to these cases.

BANK OF NORTH AMERICA v. WHEELER.

[28 CONNECTICUT, 433.]

JUDGMENT OF STATE COURT HAS SAME CREDIT, validity, and effect in every other court of the United States which it has in the state where pronounced, and whatever plea would be good to a suit thereon in such state, and no other, can be pleaded in any other court of the United States.

RECOVERY OF JUDGMENT IN ONE STATE IS BAR to the further prosecution of the same cause of action by the same parties in another state.

DOMESTIC JUDGMENT MERGES AND EXTINGUISHES CAUSE OF ACTION for which it was rendered in the courts of the same jurisdiction; consequently, no suit can be maintained upon the original cause of action, but only upon the judgment.

WHEN SUITS ARE PENDING IN DIFFERENT STATES UPON SAME CAUSE OF ACTION, plaintiff must elect in which state he will proceed to final judgment.

WHERE RECEIVERS OF BANK bring suit in one state in their names as receivers, and at the same time institute suit in another state in the name of the bank, both suits involving the same cause of action, and being against the same defendant: *Held*, that the receivers having power by law either in their own names or in the name of the bank to commence and prosecute suits, in law or equity, on claims in favor of the bank, that a judgment recovered by them as receivers would have the same effect as if recovered in the name of the bank, and would bar the action in the other state.

APPEAL BY WRIT OF ERROR DOES NOT VACATE OR SUSPEND JUDGMENT appealed from either in New York or Connecticut. Therefore a judgment obtained in either state is, pending appeal, a bar to the prosecution of the same cause of action, between the same parties, in the other state.

ASSUMPSIT upon certain checks indorsed by defendant. Plea, the general issue, with notice that defendant would prove that since the institution of suit judgment had been recovered by plaintiffs against defendant, upon the same cause of action, in New York. It was then proved that during the pendency of the present action judgment had been rendered in New York in favor of certain parties, as receivers of plaintiffs, against defendant, upon the same cause of action as the present suit. It was also shown that defendant had taken an appeal from said judgment, which was pending at the present time. The receivers, in the name of the bank, instituted the present suit,

and attached real estate belonging to defendant. The case, upon these facts, was reserved for the advice of this court.

Blackman, for the plaintiffs.

Beach, for the defendant.

By Court, STORRS, C. J. It is not necessary for us to consider the questions which have been made on the argument respecting the character of the instruments on which this suit is brought, and their presentment, and notice of their non-payment, because we are of the opinion that the recovery of the judgment upon them in the state of New York is a complete defense to this action. This conclusion necessarily results from the effect given by the constitution and laws of the United States to the judicial proceedings of the states of this Union in connection with the effect which the law of New York gives to that judgment.

The first section of the fourth article of the constitution of the United States declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and authorizes congress to prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. In pursuance of this power, congress, in their act of May 26, 1799, after prescribing the manner in which the records and judicial proceedings of the state courts shall be authenticated, enacted that the "records of judicial proceedings of the state courts so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." In *Mills v. Duryee*, 7 Cranch, 481, the supreme court of the United States considered that congress, by thus declaring that the same faith and credit should be given to such records as they had in the courts of the state from whence they were taken, had prescribed the effect of such records, and that if they had the faith and credit of record evidence there, they must have the same faith and credit in every other state in the Union; and that it therefore remained only to inquire, in every case, what is the effect of a judgment in the state where it is rendered. In *Hampton v. McConnell*, 3 Wheat. 234, which was declared by Chief Justice Marshall to be precisely the same case as that of *Mills v. Duryee*, *supra*, he states that "the doctrine there held was that the judgment of a state court should have the same credit, validity, and effect in every other court in the

United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none other, could be pleaded in any other court in the United States."

This principle has since been universally recognized and adopted, with the exception of a case decided by the county court of Baltimore, in which that court, as we think misapprehending the decision in the case of *McElmoyle v. Cohen*, 13 Pet. 312, came erroneously to a different conclusion: 1 Penn. Law Jour., N. S., 142. See *Lapham v. Briggs*, 27 Vt. 27; *Boston India Rubber Factory v. Hoit*, 14 Id. 92; *Andrews v. Montgomery*, 19 Johns. 162 [10 Am. Dec. 213]; *McElmoyle v. Cohen*, *supra*; *Green v. Sarmiento*, 1 Pet. C. C. 74; *Napier v. Gidiere*, 1 Spears Eq. 215 [40 Am. Dec. 613]. The principle adopted in *Mills v. Duryee*, *supra*, was established in these cases, although the recovery of a judgment in another state was not in either of them, as in the present case, interposed as a defense to a suit upon the claim then in question. The particular manner, however, in which the question arose is obviously unimportant. But the recent case of *McGilvray v. Avery*, 30 Vt. 538, is precisely in point here, even as to the manner of applying the principle. In that case the defendant was sued simultaneously by the plaintiffs both in New Hampshire and Vermont, upon the same cause of action. The plaintiffs obtained a judgment in the New Hampshire suit, which had not been paid, and that judgment was set up as a defense to the suit in Vermont; and it was held that the recovery of that judgment was a bar to the further prosecution of the suit in the latter state. The reasoning of the court, in its opinion given by Bennett, J., is so full, and in our opinion so satisfactory, that it would be little more than a repetition of it if we were to undertake to examine this question upon principle. The only inquiry which remains on this point is as to the effect in New York of the judgment rendered in that state upon the present cause of action. Upon that subject, it is sufficient to say that no principle of the common law is better established than that a domestic judgment merges and therefore extinguishes the cause of action for which it was rendered in the courts of the same jurisdiction, and changes it into a security of a higher nature, and consequently that a suit cannot be maintained upon the original cause of action, but only upon such judgment: *Boardman v. De Forest*, 5 Conn. 9; *Roades v. Barnes*, 1 Burr. 9. And that such is the law of New York is undisputed.

How far the pendency of a suit in one jurisdiction may be pleaded in abatement of a suit pending in the same or another, it is not necessary to consider, as the rules on that subject have no application to the present case. Those rules are adopted on a ground which is merely personal to the defendant, and to prevent the vexation to which he might be exposed by an unnecessary multiplication of suits. The effect which is given to the recovery of a judgment upon a particular cause of action is founded as well upon a principle of justice as of high public policy, which requires that after a matter has once been settled by the judgment of a court, there should be an end of litigation concerning it.

The plaintiffs urge the inconvenience arising from holding the judgment in New York to be a defense in the present suit, in consequence of the loss of the security obtained by attachment in the latter. We are not, however, at liberty to impair the effect which the constitution and laws of the United States give to judgments rendered in the several states, although it may be attended with inconvenient or even apparently unjust consequences. The remedy is elsewhere. When suits are pending in different states upon the same cause of action, the plaintiff must elect in which he will proceed to final judgment. The plaintiffs also claim that, as the suit in New York, in which judgment was there rendered, was in favor of the receivers of the plaintiffs in this case, the parties in the two suits are different, and that the judgment recovered in that suit is no defense in the present. Such receivers, by the law under which they were appointed, having power, in the corporate name or in their own names as receivers, to commence and prosecute all suits in law or equity on claims in favor of the bank, and being clothed with all the powers and rights for the collection of debts due to the bank, or for the recovery of property belonging to it, which the corporation possessed by virtue of its charter before their appointment, they are merely the representatives of such corporation and act solely on its behalf, and we therefore think that the judgment recovered by them in that capacity should have the same effect as if it was recovered in the name of the corporation.

The plaintiffs finally claim that the judgment in New York is set aside or suspended by the appeal from it to the court of appeals of that state, and that it therefore constitutes no defense in this suit. The effect of that appeal depends upon the character of the jurisdiction of that court. If, by the laws of New

York, a case carried before it by appeal is to be retried by it as upon original process in that court, and it has jurisdiction to settle the controversy by a judgment of its own, and to enforce that judgment by its own process, the appeal, like an appeal under our statutes from a justice of the peace to the superior court, would vacate the judgment of the inferior tribunal: *Curtiss v. Beardsley*, 15 Conn. 518; *Campbell v. Howard*, 5 Mass. 376. But if the appeal is in the nature of a writ of error, and only carries up the case to the court of appeals as an appellate court for the correction of errors which may have intervened on the trial of the case below, and for its adjudication upon the question whether the judgment appealed from should be affirmed, reversed, or modified, and that court has no other powers or duties than to affirm, reverse, or modify that judgment, or remit the case to the inferior tribunal, that it may conform its judgment to that of the appellate tribunal, then such appeal, like an appeal under our laws from the probate court to the superior court, does not vacate or suspend the judgment appealed from; and the removal of the case to the appellate court would no more bar an action upon the judgment than the pendency of a writ of error at common law, when that was the proper mode of correcting errors which may have occurred in the inferior tribunal. That such an action would not be barred by the pendency of such a proceeding is well settled. The judgment below is only voidable, and stands good until set aside: *Case v. Case*, Kirby, 284; *Sloan's Appeal from Probate*, 1 Root, 151; *Curtiss v. Beardsley*, 15 Conn. 523; By a reference to the laws of New York and the decisions of that state to which we have been referred, it clearly appears that the appeal now in question did not carry up the matter in controversy, in the case in which it was taken, to be retried in the court of appeals as upon original process, but only presented the case to that tribunal for its revision, and that it had no jurisdiction except to affirm, reverse, or modify the judgment appealed from and remit the case to the inferior tribunal. It was accordingly held, and in our opinion correctly, by Judge Nelson, in the United States circuit court for this district, at its September term, 1854, in *Seely v. Prichard*, 3 Duer, 669, that under the laws and practice of the state of New York a judgment was not impaired by an appeal, but that an action of debt was sustainable thereon while the appeal was pending. We would only add that if the judgment rendered in the state of New York upon the present claim should be there reversed or modified, the plaintiffs can obtain such relief as shall be

just by a proper application in the superior court for that purpose.

We therefore advise that judgment be rendered in favor of the defendant.

In this opinion the other judges concurred.

Judgment advised for defendant.

JUDGMENT OF STATE COURT VALID THERE IS BINDING IN ALL OTHER STATES where it is subject to the same pleas, and none other, as would be effectual in the state where rendered: *Cook v. Thornhill*, 65 Am. Dec. 63.

CONCLUSIVENESS OF JUDGMENTS OF SISTER STATE: See *West Feliciana R. R. Co. v. Thornton*, 68 Am. Dec. 778, and note 782.

CONTRACT BECOMES MERGED in and extinguished by a judgment obtained thereon: *Pike v. McDonald*, 54 Am. Dec. 597; *Wann v. McNulty*, 43 Id. 58, and citations in notes to these cases.

JUDGMENT, VALIDITY OF, PENDING APPEAL: *Souter v. Baymore*, 47 Am. Dec. 518; *Planter's Bank v. Calvit*, 41 Id. 616; *State v. McIntire*, 59 Id. 566, note 572. Where, by the laws of the state where judgment is obtained, an appeal does not vacate the judgment appealed from, or stay execution, the pendency of the appeal is no bar to an action on the judgment in another state: *Faber v. Hovey*, 117 Mass. 108; *Rogers v. Hatch*, 8 Nev. 41, both citing the principal case.

WHERE SUITS ARE PROSECUTED IN DIFFERENT STATES AT SAME TIME, the pendency of the one first commenced cannot be pleaded in abatement of the other subsequently prosecuted in another state; but a judgment in either, without reference as to which was commenced first, may be pleaded in bar of the other: *United States v. Dewey*, 6 Biss. 503. Such judgment is conclusive, and is a bar to an action between the same parties, on the same cause of action, in a state other than that in which such judgment was rendered: *Barnes v. Gibbs*, 31 N. J. L. 320, both citing the principal case.

BRIDGEPORT SAVINGS BANK v. ELDREDGE.

[28 CONNECTICUT, 553.]

SECOND MORTGAGERS HAVING ACQUIRED BY FORECLOSURE the right to redeem mortgaged premises have such right after the time allowed for redemption has expired, notwithstanding a decree of foreclosure, obtained without service of process or legal notice to them, by the defendants, who by purchase represent the interest of the first mortgagee.

EQUITY POSSESSES POWER OF OPENING DECREE OF FORECLOSURE and extending further time for the redemption of a mortgage.

VALIDITY OF DECREE CANNOT BE COLLATERALLY ATTACKED, for the purpose of destroying the jurisdiction of the court, by proof of want of service of process.

WHERE DECREE OF FORECLOSURE IS INTERPOSED BY PARTY OBTAINING IT as an objection to a redemption, which, but for the effect of the decree,

would be just and reasonable, its irregularity, as well as any other circumstance which ought to set it aside or modify it, will be considered on the question whether the time for redemption shall be further extended. And the validity of the decree, in such case, is gone into, not as a technical question of evidence, but as being of itself a ground of relief to the party seeking to redeem.

EQUITY WILL RESTRAIN USE OF ADVANTAGE gained by the proceedings of a judicial tribunal, either of law or equity, when such advantage has been gained by fraud, accident, or mistake, irrespective of the inquiry whether those proceedings were regular or not, when they must otherwise make such tribunal an instrument of injustice.

EVIDENCE IS ADMISSIBLE, and not open to the objection that it contradicts the record, in case of a bill to obtain an extension of time in which to redeem a mortgage, but not taking notice of a previous decree of foreclosure; where defendants set up such decree and aver that it was rendered upon legal notice to plaintiffs, and with their knowledge and acquiescence, plaintiffs may offer evidence to negative these allegations, and to show that there was no legal notice, nor actual knowledge of the suit.

BILL to redeem. The opinion sufficiently states the facts.

Beardsley and Hawley, for the plaintiffs.

Dutton, Blake, and Treat, for the defendants.

By Court, STORRS, C. J. The plaintiffs, being second mortgagees, and having acquired by foreclosure the ultimate right to redeem the mortgaged premises from the defendants, who have purchased and therefore represent the interest of the first mortgagee, have clearly the right of redemption sought by this bill but for the objections urged by the defendants. It is only necessary, therefore, to notice those objections. The first involves the merits of the case on the facts found by the court, and is confined to the legal effect of the decree of foreclosure obtained by the Bridgeport bank, under which the defendants claim. The other respects the manner in which the present bill is framed, in case the plaintiffs are entitled on the merits to the relief they seek, and therefore involves only a question as to its form.

We are of the opinion that neither of these objections ought to prevail. The substantial question here is, whether the plaintiffs should now be allowed to redeem the mortgaged premises from the defendants, notwithstanding the decree of foreclosure heretofore obtained by the latter; in other words, whether a sufficient ground is shown for the opening of that decree. That a court of equity possesses, and for what it deems a just and reasonable cause will exercise, the power of opening a decree of foreclosure and extending still further the

time for the redemption of a mortgage, is too well established to require a reference to authorities. It has always been exercised by that court, and without any question, and rests on the same principle as that upon which the court first limited the time for redemption.

In respect to the first objection of the defendants, they claim that the former decree of foreclosure appears from the record of that case to have been regularly obtained; that the facts which that record finds, including the legal service of the petition on which that decree was made upon the defendants therein, cannot be contradicted in this case on the ground that the record in that case imports absolute verity, and cannot be thus collaterally impeached; and that therefore that decree constitutes a bar to the present bill. No part of that decree has been attempted to be here contradicted, excepting the fact that the defendants therein were legally served with the process in that case. Whether as a matter of evidence merely, if the question were as to the legal validity of that decree, it would be competent for the plaintiffs, under the rule protecting the verity of judicial records, to question collaterally the fact of the service of that petition for the purpose of destroying the jurisdiction of the court, and thus annulling its decree in that case, is a point which certainly admits of a question. We are inclined to the opinion that for that particular purpose it would not be allowable thus to falsify that record. But it is not necessary to decide that point. The question as to opening a decree of foreclosure does not turn upon the inquiry whether the proceedings on which the decree was obtained were regular, but may depend on other equitable considerations wholly independent of that inquiry; although, indeed, where such a decree is interposed by the party obtaining it as an objection to a redemption which, but for the effect of the decree, would be clearly just and reasonable, its irregularity, as well as any other circumstances which ought to set it aside or modify it, will be considered on the question whether the time for redemption shall be further extended, in which latter case the manner of obtaining the decree to be relieved against is gone into, not as a technical question of evidence, but as being of itself a ground of relief to the party seeking to redeem; and the inquiry is analogous to, or rather seems to be really in substance, the familiar proceeding in chancery for a new trial in the nature of a bill of review, the object of which is to set aside or correct the former proceedings in that court, rather than a collateral attack upon them. Hence, it by no means follows that the

operation of the decree in question would not be relieved against, if it were conceded that it was obtained in all respects regularly. On the contrary, no principle is better settled or more frequently acted on than that a court of equity will interfere to restrain the use of an advantage gained by the proceedings of a judicial tribunal, either of law or equity, irrespective of the inquiry whether those proceedings were regular or not, when they must otherwise make either of those tribunals an instrument of injustice in all cases where such advantage has been gained by the fraud of the opposite party, or by accident or mistake, without the fault of the party seeking relief against them. In regard to the judgment of a court of law, it does not in such a case reverse that judgment, but, conceding it to be valid, it prevents its being used for an unconscientious or inequitable purpose. In regard to its own decrees or proceedings, it may set them aside, or, allowing them to stand, restrain the parties from the use of them for a like improper purpose. If any of these proceedings were void for irregularity, there would obviously be no occasion to apply directly to any court for relief against them; they would be a nullity, and therefore of no avail, however attempted to be used.

Applying these familiar principles, we are clearly of the opinion that the circumstances under which the Bridgeport bank obtained the decree on which the defendants rely in this case were such that they ought not to be allowed to use it for the purpose of preventing the right of redemption sought by this bill. It was obtained under a mistaken belief on the part of the bank that the present plaintiffs were legally notified of the bill on which it was founded. There was plainly no such notice, as there was no express or implied authority on the part of the person who undertook to accept the service of the citation; nor had the present plaintiffs any knowledge of that proceeding until after the decree was made and the time limited by it for redemption had expired. And it is found that they would have redeemed the mortgaged property within that time if they had known of the decree. In preventing the defendants, under these circumstances, from taking advantage of that decree in this case, we only preclude them from availing themselves of a decree which they could not conscientiously have obtained if they had been aware of the want of notice of the bill to the defendants in the case, and of which they can now no more conscientiously avail themselves, since the want of such notice has come to their knowledge. Unless, therefore, the plaintiffs are precluded from availing themselves of this

objection to the decree by the manner in which the question is here presented, they are entitled to the relief they seek, notwithstanding that decree.

This presents the only other objection of the defendants to the relief here sought. They claim that the former decree cannot be attacked thus collaterally on this bill as now drawn; but that it should have been framed for the direct and avowed purpose of opening and setting aside or modifying that decree, and that, as there are no allegations in it adapted to or praying for such relief, the evidence of the plaintiffs in regard to the manner in which the decree was obtained was not admissible. There is certainly force in this objection; but, considering the manner in which the question is here presented, it is our prevailing opinion that the evidence was properly received, and should have its full effect. However special or particular the statements in a bill are generally required to be, where relief is sought against the inequitable operation of a judgment or decree, we think that the rule should not be applied in a case like the present, where the object is merely to obtain liberty for further time to redeem a mortgage, and the only objection is a previous decree of foreclosure, subsequent to which no new rights have been acquired. The facts alleged in this bill, unanswered, present a clear title to relief. The decree formerly made does not constitute nor could it properly be set up by way of answer as an absolute or positive bar or objection to the extension of the time for redemption, but at best constitutes only an equitable reason against such extension. The bill is in the ordinary form of a bill for redemption, taking no notice of the previous decree. The defendants, in their answer, not only set up the decree, but aver that it was rendered upon legal notice to the plaintiffs, and with their actual knowledge and acquiescence. The plaintiffs then, after the defendants have presented their proof, offer evidence to negate these allegations, and to show that there was no legal notice, and that they had no actual knowledge of the suit. To this evidence the defendants object, solely on the ground that it contradicts the record. This was clearly a point of no importance on the question whether the decree constituted an equitable reason why the plaintiffs should not be allowed to redeem, and the evidence being admissible for the purpose of showing that the decree did not constitute such reason, and for the purpose of negating the allegations of the answer, and not objected to on any other ground, we think that we ought not now to reject it from our

consideration, but that it ought to be treated as being properly before us, and entitled to the same effect as if the manner of its introduction was in all respects regular and unexceptionable. We are, therefore, on the whole, of the opinion, not, however, without some hesitancy, that the plaintiffs were rightly permitted to impugn the effect of the decree, and that the superior court should be advised to grant the prayer of the bill.

In this opinion the other judges concurred; SANFORD, J., with much doubt, however, as to the propriety of granting the relief upon the bill in its present form.

Advice that prayer of the bill be granted.

RIGHT OF ONE NOT MADE PARTY to foreclosure proceedings: *Bates v. Rudick*, 65 Am. Dec. 774; and as to when equity will relieve against a decree rendered without notice, see *Gregory v. Ford*, *ante*, p. 639, and notes.

WHEN DECREE OF FORECLOSURE WILL BE OPENED: *Millspaugh v. McBride*, 34 Am. Dec. 360; *Littell v. Zuntz*, 36 Id. 415. Anything inequitable in the decree or its results may have an important bearing upon the question of opening the decree and extending the time for redemption: *Seymour v. Davis*, 35 Conn. 271, citing the principal case.

JUDGMENT CANNOT BE IMPEACHED IN COLLATERAL PROCEEDING by showing want of service of process: *Tarbox v. Hayes*, 31 Am. Dec. 478, and note 481. That a decree of foreclosure cannot be thus impeached, see *McDowell v. Goldsmith*, 61 Id. 305.

EQUITY WILL RESTRAIN ENFORCEMENT OF JUDGMENT obtained by fraud, accident, or mistake: *Litchfield's Appeal*, *ante*, p. 662, and note. This is within the peculiar province of a court of equity when there has been no fault on the part of the party seeking relief: *Bostwick v. Stiles*, 35 Conn. 198. And though it may be true that equity will not vacate a judgment obtained without service of process, still it will interfere to prevent the use of it as an instrument of injustice, by the party committing the wrong: *Martin v. Parsons*, 49 Cal. 100, both of the latter cases citing the principal case.

MUNSON v. MUNSON.

[23 CONNECTICUT, 582.]

EQUITY WILL NOT GRANT RELIEF BY BILL QUIA TIMET as a matter of course; much must depend upon the extent and imminence of the danger threatened, the view of the case taken by a discreet judge, and the circumstances and necessities of each particular case.

WHERE PETITIONER HAS LEGAL TITLE and adequate remedy at law, the respondents being in possession without right, and liable to ejectment by petitioner, there is no apparent cloud on the title which needs to be removed, and no ground for relief by bill *quia timet*.

WHERE RESPONDENT'S DEED, though later in execution than petitioner's, was recorded first, through an agreement with petitioner's grantor that his deed should not be recorded, this is not such cloud upon the title of petitioner as to constitute ground for relief by bill *quia timet*.

WHETHER RELIEF WILL EVER BE GRANTED BY BILL QUA TIMET if the deed or instrument prayed to be canceled appears on its face to be void, *quare*. **EQUITY WILL RELIEVE BY BILL QUA TIMET** when such relief is proper, and the ground of objection or invalidity of the deed or instrument does not appear from its face and has to be proved by evidence *abunde*.

BILL to remove a cloud from petitioner's title. It appears that one C. Munson was, in 1851, the owner of the land in dispute, and that he at that time conveyed it to petitioner, H. B. Munson; said conveyance was delivered to petitioner, but by agreement it was not recorded until July, 1857, and the grantor remained in possession of the premises from the time of the execution of the deed until his death in March, 1858. In May, 1857, one N. W. Munson, one of the respondents, procured a mortgage of the land from C. Munson, the grantor, to secure a certain indebtedness, and at the time that the mortgage was executed respondent had knowledge of the conveyance to petitioner. In August, 1857, the other respondents, J. D. and C. R. Munson, with intent to defraud petitioner and embarrass his title, prevailed upon said N. W. Munson to assign to them his mortgage, and they brought a foreclosure suit upon it against the grantor; they then procured him to accept service, and the case was then entered upon the docket of the court; they then procured the name of an attorney to be falsely entered as appearing for the respondent. This was done without the knowledge of the attorney. It was then represented that there was an agreement between counsel that a decree should be entered, with eight days in which to redeem; and the court, relying upon the representation thus made, without evidence, granted the decree. In August, 1857, the respondents brought a like fraudulent action at law against said grantor for a covenant broken, procured judgment against him for a sum much in excess of that due, and levied upon the land in dispute. The petitioner was living out of the state during the time of these proceedings, and had no knowledge of them, and J. D. and C. R. Munson went into and remained in possession of the premises after the death of the grantor. The case was reserved for the advice of this court.

N. J. Buel and Webster, for the petitioner.

Hubbard and Kellogg, and Cothren, for the respondents.

By Court, ELLSWORTH, J. This is an application to the court for relief against an injury threatened to or impending over the petitioner's title, from the record of a certain deed and from certain judicial proceedings; or in other words, it is a bill *quia timet*.

That there is such a branch of equity jurisdiction, which may afford a preventive remedy in certain cases, will not be denied; but the power is not exercised as a matter of course, nor under any universal rule or principle of law requiring its exercise. It is preventive, as we have said, and very much must depend upon the extent and imminence of the danger threatened, and the view which will be taken of the case by a discreet judge. The general rules and principles relating to the subject are well established, and familiar to every jurist, and they are eminently beneficent in their operation. These principles are sufficient in themselves, we think, to decide the case before the court; but in the application of these principles much must be left, as a general rule, to the circumstances and necessities of each particular case.

We are satisfied that no case is made out here by the petitioner, rendering it incumbent upon or even proper for a court of equity to interpose and grant the relief asked for. The court cannot indeed grant that relief without establishing a precedent, the bearing and extent of which we cannot foresee.

On his own showing, the petitioner has, we think, adequate and complete remedy at law. He has the legal title. The respondents are in possession without the shadow of a right, and of course liable to be ejected as soon as the petitioner shall bring his suit. There is no apparent cloud on the title he discloses in himself which needs to be removed. His title is some six years earlier in date than the title he complains of, so that, so far as we can see, his way is clear at law, and his remedy certain and adequate. The only objection which might seemingly be urged against the petitioner's title lies in the fact that the deed to Noble W. Munson, though later in execution by some years than the deed to the petitioner, was recorded first; but the existence of the petitioner's deed was well known to Noble W. Munson, when he took his deed, and the petitioner's delay, too, though extending over some years, was the result of an agreement with his grantor that the deed was not to be put on record; an omission not entitled to any peculiar favor from the court, nor is it made the ground of the relief prayed for. It is not pretended that the said Noble has, by

greater diligence on his part, outstripped the petitioner in getting his deed recorded first; not a word of the kind is mentioned in the bill; nothing is heard about the recording of the conflicting deeds until the committee make their report to the court, and the fact as there presented is certainly of no kind of importance.

The cases in the books on this particular remedial interposition by a bill of *quia timet* are quite numerous in England and the United States, and in many of their features are like this case, and are without contradiction or question.

Our principal question has been, whether equity will ever interfere by such a bill, if the writing, deed, or instrument prayed to be canceled appears on its face to be of no legal validity; as in that case it is certain no action can be brought and maintained on it at law. It will of course relieve, such relief being otherwise proper, if the ground of objection or the invalidity of the instrument does not thus appear, and is to be proved by matter *aliunde*, for such evidence may be lost by time and accident.

In *Minshaw v. Jordan*, 3 Bro. C. C. 17, the master of the rolls seemed to favor this distinction. In *Ryan v. Mackmath*, Id. 15, Lord Thurlow inclined to a different opinion, that is, to the opinion that such a distinction did not prevail in all cases. In *Jackman v. Mitchell*, 13 Ves. 584, Sir Samuel Romilly said, citing the last case, that the decision was not approved at the time as the note was void, not upon the face of it, but from collateral circumstances. In *Newman v. Milner*, 2 Ves. jun. 483, Lord Loughborough ordered a bill of exchange, avowedly given by one partner in the name of the firm for his private debt, to be delivered up with costs, without waiting for a trial at law; but in *Franco v. Bolton*, 3 Ves. 368, and *Gray v. Mathias*, 5 Id. 286, doubts were thrown on this last case. In *Bromley v. Holland*, 7 Id. 3, Lord Eldon asserted the general jurisdiction, and did not concur in the decision in *Franco v. Bolton*, *supra*. The general jurisdiction is asserted and decided in *Jackman v. Mitchell*, 13 Id. 581, and in many other English cases. In *Hamilton v. Cummings*, 1 Johns. Ch. 521, all the cases are brought together, and examined by the chancellor with his usual learning and ability. He seems inclined to a liberal exercise of the power, leaving it to the sound discretion of the court to act or refuse to act. This is his language: "But while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty

strongly displayed. The exercise of this power is to be regulated by a sound discretion, as the circumstances of the case may dictate, and the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable character, or because the defense not arising on its face may be difficult or uncertain at law, or from some other special circumstances peculiar to the case and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation."

Judge Story, after reviewing the cases on this subject in his work on equity jurisprudence, closed his comments upon them with the following remarks: "But where the illegality of the agreement, deed, or other instrument appears on the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity, to direct it to be canceled or delivered up, would not seem to apply; for in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defense; nor can it in a just sense be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation or serious injury. And accordingly, it is now fully established that, in such cases, courts of equity will not interpose their authority to order a cancellation or delivery up of such instruments. Upon an analogous principle, courts of equity have refused to entertain a bill for the delivery up of a bill of exchange, on which the holder had obtained a judgment at law against the plaintiff, which was satisfied though retained in possession, as there was scarce a pretense of damage from future litigation:" 2 Story's Eq. Jur., sec. 700 a. The case of *Field v. Holbrook*, 6 Duer, 597, is a very strong one to the same effect.

These remarks of Judge Story and others seem to us to be quite applicable to and decisive of the present case, whether we consider it as involving a strict question of jurisdiction or an appeal to the discretion of the court.

We advise that the bill be dismissed.

In this opinion the other judges concurred.

Bill to be dismissed.

WHERE PARTY HAS ADEQUATE REMEDY at law, courts of equity will not entertain jurisdiction: *Lexington Life Ins. Co. v. Page*, 66 Am. Dec. 165, and note 183, collecting prior cases; *Rowland v. First School District of Weston*, 42 Conn. 82, citing, and *Alden v. Trubee*, 44 Id. 459, distinguishing, the principal

case on this point. Equity will not aid in clearing title to land when complainant's remedy at law is complete: *Moran v. Palmer*, 18 Mich. 370, also citing the principal case.

BILL TO REMOVE CLOUD ON TITLE will not lie when the instrument complained of as cloud is void on its face, or void for omission of preliminary proceedings which any one claiming under it would be required to prove: *Scott v. Onderdonk*, 67 Am. Dec. 106, and extended note on this subject, 110.

CHANCERY HAS JURISDICTION TO CANCEL DEED AND THEREBY REMOVE CLOUD from complainant's title, where such deed is *prima facie* valid, if its recitals are sustained: *Lyon v. Hunt*, 46 Am. Dec. 216; see also *Downing v. Wherrins*, 49 Id. 139, and note 147; but the party alleging the cloud on his title must show its validity, and the invalidity of his opponent's: *Banks v. Evans*, 48 Id. 734, and citations in note 742.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
DELAWARE.

STATE v. BANK OF SMYRNA.

[2 HUSTON, 92.]

TAXING POWER MAY SELECT ITS OBJECTS OF TAXATION, and arrange the basis and the amount of taxes.

EXEMPTION OF PROPERTY FROM TAXATION IS QUESTION OF POLICY, and not of power.

TAXATION MAY BE LIMITED BY LEGISLATURE.

STATE HAS POWER TO MAKE CONTRACT WHICH SHALL BIND IT IN FUTURE.

STATE MAY MAKE VALID CONTRACT TO EXEMPT PROPERTY FROM TAXATION.

CONTRACT BY STATE TO EXEMPT PROPERTY FROM TAXATION will not be implied, but will be enforced when clearly expressed.

CORPORATIONS, LIKE NATURAL PERSONS, ARE CAPABLE OF MAKING CONTRACTS, even with the power that creates them.

BANKING CORPORATION'S PROPERTY IS LIABLE TO TAXATION, like the property of individuals, unless it is otherwise agreed upon in their charter; and such property consists in their franchise, or right to do banking business, within the limits of their charter; their capital invested in such business; their surplus earnings, set apart undivided; and such other property, real and personal, as they may be authorized to have.

LEGISLATURE HAS POWER TO BIND STATE BY CONTRACT with corporation created by its charter not to tax for a given time the franchise or property of such corporation further than is agreed upon in the charter.

CHARTER PROVIDING THAT FRANCHISE OR PROPERTY OF CORPORATION SHALL NOT BE TAXED for a given time, or further than agreed upon in the charter, is contract between the state and the corporators, which is inviolable under the constitution of the United States; and an agreement to limit or restrain the power of the state to impose further taxes on the franchise of a corporation during the continuance of its charter may enter into such a contract and have binding force.

BONUS IS PRICE PAID FOR FRANCHISE, OR POWER TO DO BANKING BUSINESS, and may be measured by tax on capital stock, or by a specific sum stipulated; but unless otherwise stipulated and agreed upon in the charter,

the payment of a price for a franchise no more exempts from taxation other property of the corporation, such as the surplus accumulation of earnings derived from that business while in its hands undivided, than it does the dividends in the hands of the stockholders, or the banking house, or any other real property which it holds.

FRANCHISE OF CORPORATION MAY BE EXEMPTED FROM TAXATION BY CHARTER; but this affords no such immunity beyond what is expressly stipulated in the charter. The franchise is one property and the capital stock another.

TAX ON BANK'S CAPITAL STOCK WILL NOT EXEMPT BANK FROM TAX IMPOSED ON ITS SURPLUS OR CONTINGENT FUND—CONSTRUCTION OF STATUTES.—The Bank of Smyrna was incorporated under the legislative condition that the company should pay the state semi-annually at the rate of one half of one per cent per annum on the stock actually paid in, during the continuance of the charter. This provision, however, was repealed at the ensuing session of the legislature, and before the bank was organized. This repealing supplement or act provided that "in lieu of other taxes" the bank should pay a tax semi-annually at the rate of one fourth of one per cent on the whole of the capital stock actually paid in, during the continuance of the charter. By a subsequent act, a tax of one fourth of one per cent was imposed on seventy-five per cent of the surplus or contingent fund of the state banks generally. The words "in lieu of other taxes," contained in the supplemental act to the charter, were held not to exempt the bank from the payment of the last-mentioned tax imposed on its surplus or contingent fund, by the general act of the legislature. It was also held that these words would not warrant the inference that the state thereby agreed not to impose any tax thereafter on this or any other property of the bank. The general act imposing the tax on the surplus or contingent fund of the state banks generally, so far as it related to the Smyrna bank, was also held constitutional, and the bank bound to pay it.

EXEMPTION OF PROPERTY OF CORPORATION FROM TAXATION can last only during the continuance of the charter granting this immunity. And unless this exemption is expressed when the charter is renewed and extended, the power to tax will revive.

ACTION in the court of errors and appeals, authorized by a resolution of the legislature, "in relation to the Bank of Smyrna," adopted February 25, 1857, to adjudicate the question of the constitutional validity of an act of the legislature entitled "An act to tax the surplus or contingent fund of the banks of the state of Delaware," passed February 24, 1855, so far as it concerned the Bank of Smyrna. The other facts are stated in the opinion.

W. Saulsbury, for the plaintiff.

Fisher, attorney-general, for the state.

D. M. Bates and Smithers, for the defendant.

By Court, HARRINGTON, Chancellor. This case involves the question of the constitutionality of an act of the legislature of 1855, taxing the surplus earnings of the banks; the Bank of Smyrna contending that by its charter it is exempt from taxation, otherwise than to the amount of one fourth of one per cent of its capital. Some of the banks having accumulated a large surplus fund, the legislature thought proper to impose a tax on these surplus funds, as a part of their banking capital, which the bank of Smyrna resists under a claim of exemption, and a case was agreed upon to settle the question, which involves several fundamental questions touching the powers of the legislature to impose additional taxes on corporations: the power of one legislature to bind subsequent legislatures not to impose further taxes, the immunities of corporations generally, and the particular exemptions of this company under the terms of its charter.

The Bank of Smyrna was incorporated on the condition of paying a tax of one half of one per cent on its capital. The other banks of the state at that day paid but one fourth of one per cent; and because, probably, of this discrimination, the amount of stock required to be subscribed for its organization was not taken. At the next session, the legislature repealed the tax of one half of one per cent, and enacted that "in lieu of other taxes," the bank should pay one fourth of one per cent on its capital; and with this change, the bank went into operation. It was several times renewed, and it continued to do business without further taxation until 1855, when in the act renewing its charter, the legislature imposed a tax of one half of one per cent. The bank submitted to this; but by a subsequent general law, all the banks were required to pay tax also on seventy-five per cent of their surplus earnings, which was the tax now objected to by the defendants.

Since the decision of the supreme court of the United States, in the case of *Bank of Ohio v. Knoop*, 16 How. 369, S. C., 21 Curtis Cond. R. 190, and the many cases which have succeeded it, the question cannot be considered open for argument, whether the legislature can bind the state by contract with a corporation created by its charter not to tax for a given time the franchise or property of such corporation further than is agreed on in the charter. It was long before that case settled that such a charter was a contract between the state and the incorporators which was protected by the constitution of the United States and was inviolable. And it is now settled that

an agreement to limit or restrain the power of the state to impose further taxes on the franchise of a corporation during the continuance of its charter may enter into such a contract and have binding force. The argument that the power of taxation, being an essential attribute of state sovereignty, cannot be limited by the legislature, has been fully considered and refuted by the supreme court of the United States; and the theory revived again in this case, which supposes there are restrictions on legislative power not to be found in the constitution, but existing above it and to be enforced by the courts, is also exploded.

Every power of government may be said to be a sovereign power; most of them are essential to its sovereignty; all of them are liable to be abused; yet it cannot be said that because they may be abused they shall not be used; and the proper use of many of them requires prospective arrangement that shall not be liable or subject to change at each succeeding legislature. The power to make contracts is equally a sovereign attribute with the power to tax; and yet a contract which is to be subject to change or annulment by one of the parties at pleasure is no contract; and unless the state can restrain its own power so to change its will in this respect, the power of making contracts, essential to sovereignty, is destroyed. The exemption of property from taxation is a question of policy, and not of power. Such an exemption would generally be impolitic, and should not be granted except for great public objects; but the legislature is the proper judge of this. It selects the subjects of taxation, and arranges the basis and the amount of taxes. Practically, it is always exempting some species of property or other from taxation, or preferring one mode of raising revenue by taxation to another, as policy dictates; and if such policy, in the judgment of the sovereign taxing power, dictates the entire exemption of any species of property from taxation for a given time, it is the proper exercise of such power so to exempt it; and as the state has the power also to make contracts, it is the proper exercise, and not the relinquishment, of the power of taxation to stipulate for exemption in a given case, and on a sufficient consideration. Such a contract for exemption, however, will not be implied; though it will be enforced when clearly expressed. It will not be presumed that the state has lightly parted with the power of taxation. The state may own and sell in fee-simple an estate in land. While so owned, it would not be taxed. When sold, though for its full value, it would be sub-

ject to tax, as other property of the same kind; and the purchaser could not claim that because he bought of the state at its full value it was exempt, as before, from taxation; but if in the contract of sale the legislature should think fit to agree that it should for a limited time be exempted from taxation, it would be perfectly competent for it to make such a contract, which would then be under the protection of the federal constitution.

Corporations are the creatures of the legislatures, created for public and useful objects, and are often the only means of effecting these objects. Their character and extent, their powers and immunities, as well as their duties and obligations, are just such as the legislature pleases to make them; but when made, like natural persons, they are capable of making contracts even with the power that creates them, or with subsequent legislatures, and their contracts, when made, are under the same protection as other contracts. Their property, in the case of banking corporations, is their franchise, or right to do banking business within the limits of their charter; their capital invested in such business, their surplus earnings set apart undivided, and such other property, real and personal, as they may be authorized to have. All this is liable to taxation just as the property of individuals is liable to taxation, unless otherwise agreed upon in their charters. They may trust, as all others on acquiring property trust, that the legislature will not tax them beyond certain limits; but this imposes no obligation on the legislature. It is a mere calculation of chances, or reliance on public justice or policy, and affords no legal immunity beyond what is expressly stipulated in the charter. The *bonus* is the price paid for the franchise—the power to do banking business. Whether measured by tax on capital stock, or by a specific sum stipulated, it is the price paid for doing business as a bank; and unless otherwise stipulated and agreed upon, it no more exempts other property, such as the surplus accumulation of earnings derived from that business while in its hands undivided, than it does the dividends in the hands of the stockholders, or the banking-house, or any other real property which it holds. These views are fully sustained by the supreme court, in *Gordon v. Appeal Tax Court*, 3 How. 133, 15 Curt. Cond. R. 388. In that case the court says: “The franchise is their corporate property, which, like any other property, would be taxable if a price had not been paid for it, which the legislature accepted as the consideration for allowing them to use the franchise during

the continuance of their charters. The capital stock is another property, corporately associated for the purpose of banking; but its parts are the individual property of the stockholder in the proportions they may own them. Being their individual property, they may be taxed for it, as they may be for any other property they may own."

We have, then, only to look at the several laws constituting the charter of the Bank of Smyrna to see if the legislature has, by contract, exempted its surplus earnings from the common liability of all other property to taxation, having ascertained that it was competent for the legislature, by contract binding on subsequent legislatures, to exempt this or any other part of its property from taxation. It was incorporated in 1821 for twenty years, and by the eighteenth section of its charter it was provided that if the sum of seventy-five thousand dollars should not be subscribed for in its capital stock by the first of September, 1822, the charter should cease and be of no effect; and by the twentieth section it was enacted "that as a condition of the passing of this act" the company should pay to the state treasurer semi-annually, for the use of the state, "at the rate of one half of one per centum per annum on the stock actually paid in for and during the continuance of the present charter." But before the organization of the company pursuant to this provision of the charter, a supplement to it was passed by the legislature on the seventh of February, 1822, continuing its corporate powers until 1843, repealing the twentieth section of the original charter, and enacting "that in lieu of other taxes, the president, directors, and company of the Bank of Smyrna shall pay the treasurer of the state, for the use of the state, a tax semi-annually at the rate of one quarter of one per centum on the whole capital stock of the said bank actually paid in, for and during the continuance of the said bank, from and after the first day of September next." In 1837 the corporation was extended to February, 1857, with "all its rights, powers, and privileges, franchises, and immunities vested in it by any law of the state;" and on the thirteenth of February, 1855, the charter was again renewed and extended for twenty years. But it is to be remarked that in this last act of renewal, the act of 1822, which contains the expression relied on in the argument of the counsel for the defendants as conferring an immunity from further or future taxation, "in lieu of other taxes," is not referred to, nor are the words "rights and immunities," occurring in the renewal and extension of the charter in 1837, contained in this act; the second section of which provides that "the tax to be hereafter paid by

the said bank shall be one half instead of one quarter of one per centum per annum; provided that no tax shall be required on any stock held for the benefit of the school fund."

The question, therefore, is, whether under this act of the thirteenth of February, 1855, which now constitutes its charter, incorporating as it does all the previous acts to the extent to which it proposes to incorporate them, the Bank of Smyrna has any right or immunity to be exempt from any other taxation than that imposed by the act of 1822, which was one fourth of one per cent on its capital stock. The powers of the company are derived, exclusively, from the act of extension. That act might adopt, by reference, the language of any other, but the exemption must be expressed at the time of renewal. In the case before referred to, *Gordon v. Appeal Tax Court*, 8 How. 138, S. C., 15 Curt. Cond. R. 888, it is said the exemption lasts only during the continuance of the charter, and when extended without any such promise, the power to tax revived. In that case, the exemption was in the most formal terms, as follows: "And the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act;" yet these words being omitted in the act of extension, it was held that they were after that liable to further taxation. And this is peculiarly the case in our state, since by constitutional limitation these charters are restricted, in the grant and duration of them, to a period not exceeding twenty years, and the power of the legislature to confer such immunity must have the same limit. The exemption in question must therefore be shown to exist by the express grant of the legislature in the act of 1855. But, as we have before remarked, the legislature, in that act of renewal, not only omitted to extend the rights and immunities granted in the previous act, but wholly omitted to notice the particular act under which the exemption is now claimed. It extends only the "powers, privileges, and franchises" belonging to or vested in the bank created by the act of 1821, and renewed and continued by the act of 1837; whilst this assumed immunity is by force of a supplement passed in 1822.

The court might properly rest its judgment on the failure to repeat in the last renewal of the charter a supposed pledge given in a former act, which by its own limitation, as well as by constitutional necessity, has expired; but the words "in lieu of other taxes," used in the act of 1822, are an insufficient foundation for the surrender of the taxing power. They are capable

of explanation otherwise and without any forced construction of the act. The previous act of 1821 imposed, though not by the name of tax, as a condition for the grant of the banking franchise, an obligation to pay the state one half of one per cent on the capital paid in; the act of 1822 repealed this, and added that in lieu of other taxes the bank should pay one fourth of one per cent on its capital. The one half per cent is the thing in the law repealed, in whose place was substituted, by the law repealing it, the one fourth of one per cent in lieu thereof; and it would be rather a strained inference to draw a solemn agreement by the state not thereafter to impose any other tax on this or any other property of the bank. For the act of the twenty-fourth of February, 1855, taxing the surplus fund of all the banks, is not a tax upon their stock; and the objection to it goes to the full extent of denying the power to tax any property of the bank other than its stock, and might as well extend to its real property as to its surplus fund. On the contrary, the tax upon stock which would come within the exemption, if there was an exemption, was imposed, not by the act of the twenty-fourth of February, 1855, which is now objected to, but by the act of the thirteenth of February, 1855, which is not objected to; and that, too, notwithstanding the renewed charter of 1837 was not to expire until 1857, two years after the latter act was passed. The latter act was therefore more clearly a violation of the contract of 1822, if there was such a contract not to lay any other tax on the capital stock of the bank, than is the former act now under consideration, for imposing a tax on a distinct species of property, its surplus dividends.

The court is therefore of opinion that the act of February 24, 1855, entitled "An act to tax the surplus or contingent fund of the banks of the state of Delaware" is, as to the Bank of Smyrna, a constitutional law, and that the defendants are liable by virtue of that act to pay to the state semi-annually a tax at the rate of one fourth of one per centum per annum upon the surplus or contingent fund of said bank exceeding twenty-five per cent of said fund; and it is ordered that this opinion be certified to the superior court in and for Kent county.

POWER OF LEGISLATURE IN REFERENCE TO TAXATION is limited only by their own discretion and constitutional provisions: *Williams v. Cammack*, 61 Am. Dec. 508, and reference to collected cases in note thereto 519; *Nichols v. City of Bridgeport*, 60 Id. 636. The taxing power is an incident of sovereignty, the exercise of which belongs exclusively to every state, and attaches alike upon everything that comes within its jurisdiction: *People v. Coleman*, Id. 581, and notes 594; *Battle v. Mobile*, 44 Id. 438.

LEGISLATURE HAS NO POWER TO EXEMPT FROM TAXATION any species of property, however owned, under section 13 of article 11 of the California constitution, which declares that "all property in this state shall be taxed in proportion to its value:" *Minster v. Hays*, 56 Am. Dec. 366.

EXEMPTION FROM TAXATION AS CONTRACT: See *Attwater v. Inhabitants of Woodbridge*, 16 Am. Dec. 46, and extended note thereto 51, discussing the subject.

FRANCHISE, WHETHER BELONGING TO CORPORATION OR NATURAL PERSON, is property: *Baltimore v. Baltimore & O. R. R. Co.*, 48 Am. Dec. 531; *Enfield T. B. Co. v. H. & N. H. R. R. Co.*, 44 Id. 556.

FRANCHISE IS SUBJECT TO TAXATION according to its value, whether paid for by a bonus or not: *Baltimore v. Baltimore & O. R. R. Co.*, 48 Am. Dec. 531, and note 539; *Enfield T. B. Co. v. H. & N. H. R. R. Co.*, 44 Id. 556.

CHARTER IS CONTRACT: *Lincoln Bank v. Richardson*, 10 Am. Dec. 34. But the charter of a corporation is a contract only as between the state and the corporation; and where it makes the stockholders liable for corporate debts, the liability does not arise out of contract, so as to give a court of equity jurisdiction of suits by stockholders against the corporation: *Hodges v. New England Screw Co.*, 53 Id. 624. But such a contract may have implied or express reservations embraced in it: *Crease v. Babcock*, 34 Id. 61. That corporate charter or franchise is a contract, see also *Bailey v. P. W. & B. R. R. Co.*, 44 Id. 593; *Regents v. Williams*, 31 Id. 72; *Backus v. Lebanon*, 35 Id. 466, and cases cited in note to same 471. But these cases show that the charter, to be a contract, must first be accepted. Acts granting franchises are contracts, and ought to be construed by the well-established principles which regulate contracts: *State v. Real Estate Bank*, 41 Id. 109, and note 120. Legislative grants to private corporations, and conferring powers, rights, and privileges for special purposes, are contracts: *Yarmouth v. North Yarmouth*, 56 Id. 666, and note 671; *Derby Turnpike Co. v. Parks*, 27 Id. 700, and note 707; *Brown v. Hummel*, 47 Id. 431; note to *Commonwealth v. Cullen*, 53 Id. 473. And a consideration is unnecessary to render binding the executed legislative grant of such rights: *Derby Turnpike Co. v. Parks*, 27 Id. 700.

RIGHTS LEGALLY VESTED IN PRIVATE CORPORATION CANNOT BE CONTROLLED OR DESTROYED without the consent of the corporation by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation: *Wales v. Stetson*, 3 Am. Dec. 39; *King v. Dedham Bank*, 8 Id. 112; note to *Goshen v. Stonington*, 10 Id. 134, showing what are vested rights; *Lewis v. Brackenridge*, 12 Id. 228; *Crease v. Babcock*, 34 Id. 61, and note 69; collected cases in note to *Enfield T. B. Co. v. Hartford R. R. Co.*, 42 Id. 728; *Miners' Bank of Dubuque v. United States*, 43 Id. 115, and note thereto, showing the power of the legislature to repeal a corporate franchise under a conditional reservation; *Commonwealth v. Cullen*, 53 Id. 450; *Yarmouth v. North Yarmouth*, 56 Id. 666; *Thorpe v. Rutland etc. R. R. Co.*, 62 Id. 625. The grant of a charter or franchise to a corporation is a contract within the meaning of the clause in the constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts: *Trustees of N. G. S. F. v. Bradbury*, 26 Id. 515; *Derby Turnpike Co. v. Parks*, 27 Id. 700; note to *Backus v. Lebanon*, 35 Id. 471; *Brown v. Hummel*, 47 Id. 431. And independently of any express prohibition in the state or federal constitution, the property of such a corporation is, in this country at least, under the protection of the fundamental principle of right and justice inherent in the social compact, which protects the property of private persons: *Regents v. Williams*, 31 Id. 72.

CHARTERS EXEMPTING CORPORATIONS FROM TAXATION, NOW CONSIDERED: See collected cases in note to *Baltimore v. Baltimore & Ohio R. R. Co.*, 48 Am. Dec. 539.

SURRENDER OF POWER OF TAXATION WILL NEVER BE PRESUMED: *Battle v. Mobile*, 44 Am. Dec. 436; *Baltimore v. Baltimore & Ohio R. R. Co.*, 48 Id. 531.

ONE LEGISLATURE CANNOT LIMIT POWER OF SUCCEEDING LEGISLATURES by granting away the taxing power: *Moss v. Penn. R. R. Co.*, 72 Am. Dec. 664; same principle: *Wright v. Wright's Lessor*, 86 Id. 723.

WHAT PERSONAL PROPERTY OF BANK IS SUBJECT TO TAXATION: *Bank of Union v. City of Union*, 27 Am. Dec. 72.

BURDEN OR BONUS IMPOSED BY CHARTER UPON CORPORATION, or by the legislature in renewing the charter, is not a tax, but a price or condition arbitrarily or in their discretion fixed by the legislature as the consideration of its grant: *Baltimore v. Baltimore & Ohio R. R. Co.*, 48 Am. Dec. 531.

PROPERTY OF CORPORATION IS EXEMPT FROM TAXATION only in so far as it is necessary, and not merely convenient for the company to acquire and hold for the purposes for which it was incorporated under a charter which, after making provision for the payment of certain duties, enacts "that no other tax or impost shall be levied or assessed upon the said company:" *State v. Commissioners of Mansfield*, 57 Am. Dec. 408, and note to same 415.

CASE
IN THE
COURT OF CHANCERY
OF
DELAWARE.

HAYES v. HAYES.

[2 DELAWARE CHANCERY, 191.]

PAYMENT OF DEBT NOT YET DUE CANNOT BE ENFORCED BY WAY OF SET-OFF until it is due.

LAW OF SET-OFF, AS APPLICABLE TO DEMANDS NOT DUE, is the same in courts of equity as it is in courts of law.

LEGACY, NOW PAYABLE, CANNOT BE SET-OFF IN EQUITY against legatee's debt to the estate not yet due.

DECREE AGAINST LEGATEE FOR COSTS IN SUIT to enforce execution of new bond is no ground for injunction to restrain an action at law by the legatee for his legacy, as such costs could be set-off in the action at law.

RECOVERY OF LEGACY AT LAW WILL NOT BE ENJOINED IN EQUITY on the ground that the legatee is indebted in a bond to the testator payable at a future day.

LEGATEE'S ACTION AT LAW FOR LEGACY WILL NOT BE ENJOINED IN EQUITY on the ground that he is in contempt for not performing a decree made in another suit for the execution of a new bond, in the place of the original one given to the testator and subsequently lost.

BILL in equity. Defendant, John Hayes, owed his father, John Hayes, deceased, during the latter's life-time, the sum of one thousand five hundred dollars upon a judgment bond, dated April 24, 1854, and payable in ten years from date. The consideration for the bond was certain real estate conveyed by the father to his son. John Hayes, the father, died, but by his last will had, after provision for his widow, devised all his estate remaining to be equally divided between his ten children, including the defendant. On January 19, 1856, the complainant

as administrator showed a balance in his hands of five thousand seven hundred dollars and forty-three cents, distributable under the residuary clause of the will. The administrator refused to pay defendant his share of the residuary fund, and the latter brought an action at law for such share on the administrator's official bond. This bill was filed to enjoin the action at law. The bill claimed that the administrator had, by way of equitable set-off, the right to retain the defendant's legacy, and to apply the same as a credit upon the debt due from the defendant to the testator's estate. The bill further alleged that the bond could not be found after testator's death, and that the bond having been mislaid, lost, or destroyed, the administrator had obtained a decree on February 17, 1857, for a new bond, and that the defendant should pay the costs in the suit in equity. An attachment for the non-performance of said decree had been issued and returned *non est*. Defendant was a non-resident of the state, and could not be reached by the process of its courts. It was further alleged that he had sold and conveyed away the real estate for the purchase of which the bond in question was given. The complainant argued that as the debt secured by the lost bond was a part of the testator's assets, the defendant was in equity bound to make the estate secure by executing a new bond, in accordance with said decree, before he would be permitted to recover his share of the estate, that being not a debt of the estate, but a gift from the testator. Besides the prayer for an injunction, settlement, set-off, etc., the bill prayed that so much of the defendant's share of the residuary estate of the testator as might be necessary be allowed to the complainant for his costs in the suit in equity. To this bill defendant demurred.

G. B. Rodney, for the complainant.

D. M. Bates, for the defendant.

By Court, HARRINGTON, Chancellor. The question presented is, whether there is any equitable power to prevent a party from collecting at law a debt due him because he owes to the defendant a debt not due, and which the defendant may not be able to collect when it is due, if this fund is not stayed in his hands.

There is another question growing out of the loss of the evidence of the debt and proceedings in this court, to supply that evidence; the defendant being in contempt for not re-executing

a bond, according to the decree of this court, and also for non-payment of costs incurred in that proceeding. It was also argued that the costs are a debt now due to the complainant, which *pro tanto* should prevent or stay proceedings at law against him for the legacy.

Both points involve the question of set-off; the former of a debt not due, the latter of a debt due, if the costs have been paid by complainant; but which in that case the defendant contends would be a set-off at law, and that therefore it is no ground of injunction here.

In *Jeffs v. Wood*, 2 P. Wms. 128, the master of the rolls, while owning that it was against conscience that A should be demanding a debt against B, to whom he is indebted in a larger sum and would avoid paying it, expresses merely a doubt whether an insolvent person may in equity recover against his debtor, to whom he at the same time owes a greater sum; but there is no necessity to go the length of establishing, as a principle of equity, that chancery will arrest proceedings at law for the recovery of a debt due and recoverable there on the ground that the plaintiff owes the defendant a sum not yet due, the payment of which he may evade, if permitted to recover in his suit at law. The law of set-off as applicable to such demands is in this respect the same in both courts. Applied to such a case, it would be to anticipate the payment of a debt not due, and to prevent the collection of a debt which by the contract of the parties is due and collectible. If there could be any question of this equity, where the aid of a court of equity is asked to enforce the demand, I think there is none to justify one in enjoining proceedings at law, either on the ground of equitable set-off or as a means of enforcing obedience to a former decree of the court in reference to costs. I do not doubt that these costs, if paid by this complainant, would be a set-off at law to an action for the distributive share of the defendant, who by the chancellor's decree is made responsible for them.

Demurrer allowed, injunction dissolved, and bill dismissed with costs.

Decree affirmed by the court of errors and appeals at the June term, 1859. The case on appeal is not reported.

SET-OFF APPLIES ONLY TO MUTUAL DEBTS BETWEEN PLAINTIFF AND DEFENDANT: *Duncan v. Lyon*, 8 Am. Dec. 513; *Gregg v. James*, 12 Id. 151; *Bunting v. Ricks*, 32 Id. 699; *Foot v. Ketchum*, 40 Id. 678; *Annan v. Houck*, 45 Id. 133. This subject is discussed at length in the note to *Gregg v. James*,

12 Id. 152-157. As to what constitutes set-off in equity, see references in note to *Bunting v. Ricks*, 32 Id. 705. In *Chandler v. Dress*, 26 Id. 704, it is held that the law of set-off before judgment is regulated entirely by statute. Mutual credits are a ground for set-off in equity, though not at law: See note *Jeffries v. Evans*, 43 Id. 159.

SET-OFF IN EQUITY is governed by the same rules as at law: *McDonald v. Neilson*, 14 Am. Dec. 431; *Jennings v. Webster*, 35 Id. 722; *Robbins v. McKnight*, 45 Id. 406; *Blake v. Langdon*, 47 Id. 701; unless some special circumstances occur to justify interposition, as where peculiar equities intervene between the parties: *Mills v. Lumpkin*, 44 Id. 677. The right to an offset in chancery exists independently of statute, and is controlled only by the general principles of equity: *Jeffries v. Evans*, 43 Id. 158.

CASE
IN THE
SUPREME COURT
OF
FLORIDA.

MARTIN v. PENSACOLA AND GEORGIA R. R. Co.
[8 FLORIDA, 370.]

ORAL TESTIMONY IS NOT ADMISSIBLE to vary the terms of a written contract.
ORAL TESTIMONY IS INADMISSIBLE TO VARY the terms of a subscription to railway stock, unless it tend to show fraud or mistake.

ORAL TESTIMONY IS INADMISSIBLE TO PROVE INDUCEMENTS AND CIRCUMSTANCES which led to subscription for railway stock, and the understanding of subscribers when they subscribed for it, unless such testimony goes to establish fraud or mistake.

INDIVIDUAL SUBSCRIBER FOR RAILWAY STOCK SUBSCRIBERS WITH DISTINCT KNOWLEDGE AND UNDERSTANDING that the terms of the contract may be varied or totally altered at any time by a concurrence between the majority of his associates and the legislature, so that the corporation may be authorized to embark in new enterprises, wholly and essentially different from those originally contemplated; and this may be done without the subscriber's assent, and in defiance of his dissent. His only remedy is to dissent and withdraw from the association.

UTMOST GOOD FAITH SHOULD BE RIGIDLY ENFORCED between chartered corporations and their stockholders; but such corporations are to be held to a strict accountability and to the careful observance of the limitations of their chartered powers.

INDIVIDUAL SHAREHOLDER OF RAILWAY STOCK IS BOUND by action of board of stockholders, so long as such acts are regularly passed, and within the scope of the corporation's legitimate powers, and limited to the promotion of the particular enterprise contemplated in the original charter of incorporation; and the stockholder's dissent, even in the most formal manner, will not relieve him from his duty and obligation.

WHENEVER CORPORATION ACCEPTS MATERIAL ALTERATION of its charter from legislature, by regular action of stockholders in general meeting, duly organized, the act is binding upon each individual member, unless he shall expressly dissent therefrom before any debts are contracted or rights inure to third parties in carrying out the new designs or enterprise.

IN DEFENSE TO ACTION AGAINST STOCKHOLDER UNDER ALTERED CHARTER, the defendant must affirmatively show that he dissented from the alteration in a reasonable time, and before any debts had been contracted or rights accrued to third parties under such alteration. It is not incumbent upon the corporation to show the stockholder's assent in order to maintain the action.

SUBSCRIBER FOR RAILWAY STOCK WILL BE ABSOLVED FROM HIS OBLIGATION to pay therefor, unless the corporation has strictly complied with conditions precedent. Such is the case where, in the body of the subscription, there is a stipulation for a particular enterprise, as for the building of the road to a particular place, or for its location upon a specified route. Such a stipulation forms a condition precedent, and must be complied with.

AGREEMENTS TO TAKE STOCK IN RAILROAD CORPORATION, AND PRIVATE CONTRACTS, are not governed by the same rules.

CORPORATIONS ARE BOUND BY ACTS OF MAJORITY, when those acts are conformable to the articles of the constitution.

DIFFERENCE BETWEEN SIMPLE PARTNERSHIP AND INCORPORATED ASSOCIATION, where the company undertakes to depart from or add to the original object or design, as set forth in the articles of association or charter of incorporation, is that in the former case the assent of the individual member is not to be assumed: it is to be affirmatively established by competent proof; in the latter, his assent will be presumed, unless he affirmatively proves his dissent.

SHAREHOLDER IN RAILWAY CORPORATION WILL BE PRESUMED TO HAVE ASSENTED TO ACTION of the stockholders in unanimously accepting a legislative alteration of the charter, in the absence of proof to the contrary; and especially will this presumption be proper where the company has contracted debts to a large amount before any objection is made.

ASSUMPSIT to recover the amount of a subscription for railway stock. The action was brought by the appellee against the appellant, and judgment was rendered for the plaintiff. Defendant appealed. The facts are sufficiently stated in the opinion.

W. Call and D. P. Hogue, for the appellant.

J. T. Archer and R. B. Hilton, for the appellee.

By Court, DUPONT, J. This is a case of a chartered railroad company suing a recusant stockholder, to recover in an action of *assumpsit* the amount assessed upon his subscription to the capital stock of the company. The stockholder pleaded simply *non assumpsit*, with the privilege of giving in evidence, under that plea, all substantial matters of defense. The defense attempted to be set up at the trial was that the company, by the acceptance of the provisions of the internal-improvement act of 1855, and by amendments obtained from the legislature subsequent to the date of the subscription for stock, had materially altered and varied from the object and design contemplated

and set forth in the original charter of incorporation; that he, the defendant, did not assent to this alteration; and that he was consequently discharged from his obligation to pay. A large amount of evidence, documentary and oral, was adduced, with the purpose to sustain this point of the defense, and the defendant also offered a witness to prove the inducements held out at the time to individuals to subscribe to the capital stock of the company, but the court refused to permit him to be questioned to that point.

The exceptions taken below embrace as well the rejection of this witness as the instructions to the jury given and refused. The assignment of errors in this court corresponds with the exceptions. The case here was elaborately argued and ably contested by the counsel on either side. The discussion took a wide range, and resulted in bringing to the notice of the court a very large number of adjudicated cases, embracing the entire subject of the rights and duties of corporations. We are admonished by the discursiveness of the opinions delivered in those cases, and the many mere *dicta* to be found, of the great caution which ought to be observed in giving an expression of opinion on points which do not legitimately arise out of the case before us.

In this age, when all the great improvements of the country are inaugurated under the influence of and owe their successful consummation to associated capital, it would be dangerous for the court to anticipate questions which, whenever they shall legitimately arise, may tax to their fullest powers the most gigantic intellects. The law applicable to railroad charters in particular is just now in its formation or chrysalis state. They are of recent origin, and the rules to be applied to them are yet to be definitely settled. It would be well for the interest of the country, and creditable to the judiciary as an institution, that in the establishment of these rules the commendable caution of those great judges under whose plastic hands the common law was brought into being should be closely imitated. Under these impressions, and influenced by these considerations, we desire to enter upon the examination of the law which is to govern in this case.

The first question that addresses itself to our consideration grows out of the refusal of the court to permit a witness who had been offered to testify as to the "inducements and circumstances which led to the subscriptions to the railroad at the time of the first subscription," and also as to "the understand-

ing of the subscribers when they subscribed." We do not think that this exception is well taken. It is an elementary principle of the law of evidence that oral testimony shall not be admitted to vary the terms of a written contract, and upon this principle it has been ruled that such evidence is inadmissible to vary the terms of a subscription to the stock of a railway, unless it tend to show fraud or mistake: See Redfield on Railways, 70, citing *Wight v. Shelby R. R. Co.*, 16 B. Mon. 5 [63 Am. Dec. 522]; *Blodgett v. Morrill*, 20 Vt. 509; *Kennebec & P. R. R. v. Waters*, 34 Me. 369.

There was no pretense, even in argument, that there had been any fraudulent misrepresentations made to the defendant to induce him to become a subscriber to the stock of this company, or that he had made his subscription under a mistake as to the terms of the charter of incorporation. Indeed, the point was not greatly insisted upon.

Of the other exceptions, all of which are grounded upon the instructions to the jury, either granted or refused, we will consider first the fifth instruction given, which is in the following words, viz.:

"That the defendant must show that he made timely objection to the acceptance of the internal-improvement act, and the presumption is, in the absence of proof to the contrary, that he assented to the action of the stockholders who unanimously accepted the act; and especially is the presumption proper where the company has contracted debts to large amounts before any objection is made."

The evidence in the record, of which the instruction is predicated, is a resolution passed at a meeting of the stockholders, under date of the tenth of February, A. D. 1855, instructing the secretary of the company to notify the trustees of the internal-improvement fund of "the full acceptance by the company of the provisions of the act to provide for and encourage a liberal system of internal improvements in this state, approved the sixth of January, 1855." There was no evidence to show whether or not the defendant was present at that meeting, nor was it shown or attempted to be shown that he ever objected to the act of acceptance. The only objection he appears ever to have made was when he was called on by Mr. Flagg, the secretary of the company, to pay the assessment on his shares of stock. He then objected to pay, but his objection was based, not on any alteration of the charter by the acceptance aforesaid or otherwise, but expressly upon the alleged ground

“that General Shine had persuaded him and promised to take it off his hands, as he did not want it.”

This instruction raises the question, how far an individual shareholder in an incorporated company is bound by the action of a board of stockholders duly convened and organized. It is too clear to require any argument or authority to support it, that so long as the action of the board is within the scope of its legitimate powers and limited to the promotion of the particular enterprise contemplated in the original charter of incorporation, so long do their acts, regularly passed, bind the individual shareholder, and he has no right to claim any immunity, nor can he relieve himself from his duty and obligation as a shareholder, even though he should dissent in the most formal manner. It is only when the action of the board is such as proposes to vary from, add to, or radically alter the character of the original enterprise, and thereby impose new duties and obligations, that the question can ever arise. For the purposes of this argument, it will be assumed that the act of the board of stockholders, in accepting the provisions of the internal-improvement act, was of the latter character. Much error has crept into the books by the attempt to assimilate corporations to ordinary partnerships, and to apply to the one the rules of law peculiarly applicable to the other. Thus, in Angell & Ames on Corporations, where reference is made to the liabilities of individual members of a partnership, it is said: “Such precisely is the law with regard to partnership associations which are incorporated, and no point of law is more clearly and firmly settled than that if a corporation procure an alteration to be made in its charter by which a new and different business is superadded to that originally contemplated, such of the stockholders as do not assent to the alteration will be absolved from liability on their subscription to the capital stock.”

This proposition as enunciated is not sufficiently qualified. If by the term “assent” it is designed to convey the idea that in such case each individual corporator must, in order to have his liability fixed, signify his concurrence by express assent, the proposition is certainly incorrect, as it ignores the fact that, from the very nature and constitution of these respective associations, the individual in the one case speaks through his representative, the majority; in the other, he speaks *in propria personæ*. In the same authority it is said: “Corporations are subject to the emphatically republican principle (supposing the charter to be silent) that the whole are bound by the acts

of the majority, when those acts are conformable to the articles of the constitution."

"It seems," says Mr. Kyd, "to be the first suggestion of reason that an act done by a simple majority of a collective body of men, which concerns the common interest, should be binding on the whole, and this is the principle of the rule adopted by the 'common law' of England with respect to aggregate corporations:" 1 Kyd on Corporations, 422.

Upon these principles, it would seem that where the company undertakes to depart from or add to the original object or design, as set forth in the articles of association, or charter of incorporation, there is this manifest difference between a simple partnership and an incorporated association: in the former, the assent of the individual member is not to be assumed: it is to be affirmatively established by competent proof; in the latter, his assent will be presumed, unless he affirmatively proves his dissent. The ground of difference will be obvious to any reflecting mind. In the former case, the association being usually limited to a few members, they are generally competent to act in mass; whereas the latter being composed of numerous individuals residing in remote localities, they are constrained, by the very necessity of the case, to speak through a conventional medium, viz., an organized majority. If this were not so, then would great inconvenience arise whenever it should become necessary for the interest of the association to vary from or add to the objects of the original enterprise. How would it ever be possible to obtain the express assent of each corporator? In many cases, their particular localities would be unknown, and if originally known, may have been changed from place to place. If this were not so, then in every case of the decease of a stockholder, the corporation could accept no alteration of its charter, however such alteration might promote its interest, and the consequent interest of each individual corporator, without reducing the original capital by the amount of stock standing in the name of the deceased; for it would not be pretended that the executor or administrator would have the authority, in such case, to assent, however clear it is that he would have the right to dissent from the attempt to involve the estate in the new enterprise. Again: if this were not so, the rights and interests of the creditors would be at the mercy of the corporation; for upon discovering that the prosecution of the original design of the charter had involved it in debt, and that its further pursuit was likely to prove unprofitable and disastrous, in

order to absolve its members from liability from any further calls, it would only be necessary to obtain from the legislature an alteration of the charter, accept it by a meeting of stockholders composed of a bare quorum, under the provisions of the charter; and as each individual might be sued upon his subscription, he would plead a want of express assent, and unless it could be affirmatively proved that he was present at the meeting, he would be released, and the creditors defrauded of their just rights. But how is the fact of his presence to be proved? Who is the witness that will prove that he was at the meeting and consented to the alteration?

The case before us fully illustrates our views; for, of all the witnesses interrogated, none could remember whether or not the defendant was present at the meeting which accepted the provisions of the internal-improvement act, which, it is alleged, made a material alteration in the object contemplated in the original charter. And yet he may have been present, consenting to the act of acceptance, and, for the lack of this proof, he is to be absolved from his liability on his subscription, and the creditors, contractors, and laborers, who had given credit in part upon the faith of his subscription, be deprived of their just rights, and this, too, without the slightest pretense that any injury or loss has or was likely to accrue to him from the alleged alteration.

It seems to us that the distinction rests upon the most rational grounds, and that the rule to be observed on this subject is, that whenever the corporation accepts from the legislature a material alteration of their charter, if the same be done by the stockholders in general meeting, duly organized, it is binding upon each individual member, unless he shall expressly dissent therefrom before any debts are contracted or rights inure to third parties in carrying out the new design or enterprise. In this case the defendant stands by from February, 1855, sees the work progressing under the provisions of the internal-improvement act, silently acquiesces in the contraction of a large indebtedness, makes no whisper of disapprobation until he is called on to pay his assessment by the agent of the company, when, for the first time, he objects to pay, not, however, on the ground of any alleged alteration of the charter, but for the avowed reason that "General Shine had persuaded him and promised to take it [the stock] off his hands, as he did not want it."

To release the defendant from liability on his subscription

upon the ground particularly insisted on at the argument, under the circumstances developed by the record, would be to introduce into our jurisprudence a system of naked technicalities, disorganizing in their application, and pregnant with disaster and ruin to all the great enterprises in which our young and growing state has so largely embarked. We here repeat in substance what has heretofore been enunciated by the court, that while these corporations are to be held in strict accountability and to the careful observance of the limitations of their chartered powers, the cause of justice, the best interests of society, and the general weal of the commonwealth require that the practice of the utmost good faith should be rigidly enforced between them and their stockholders.

Another prevalent error upon this point is that of holding that an agreement to take stock in a railroad corporation is to be viewed simply in the light of a contract between individuals, and that it is subject to the same rules that are applicable to private contracts; but such is not the case, and for very manifest and obvious reasons, which commend themselves to the commonest understanding, as being based upon considerations of the highest import. When a man enters into a private agreement with another, the individual interests of each (with which the public have no concern) are alone involved, and no change or alteration of the slightest character may be made without the mutual consent of the parties expressly given. Each stands to the "bond," even to the exaction of "the pound of flesh." Not so, however, in the case of a subscription to the stock of an incorporation, which owes its existence to the creative power of the legislature, and is always designed and intended to subserve, in some measure, the public good. In such case, the stipulations of the contract are contained in the charter alone, and are of a general character. The individual subscribers to the contract, with the distinct knowledge and understanding that its terms may be varied at any time by a concurrence between a majority of his associates and the legislature, and that, too, without his assent and in defiance of his dissent. Nay, he subscribes with the distinct knowledge that, with such concurrence, the terms of the charter may be totally altered, so that the corporation may be authorized to embark in new enterprises wholly and essentially different from those originally contemplated, and that his only remedy is to dissent and withdraw from the association.

With these distinguishing features, can it be seriously contended that a mere subscription to the stock of a corporation

stands upon the same footing and is to be governed in all respects by the general law of contracts as applicable to private or individual agreements?

The court has not been neglectful of the adjudicated cases which were cited by the counsel on both sides, but upon a careful examination of these cases, we have found so much looseness of expression, so much mere *dicta*, and such a conflict of views upon the various questions discussed, that we have chosen rather to base this argument upon a few plain fundamental principles than to attempt to reconcile authorities which are clearly irreconcilable. To guard against misapprehension, we remark in this connection, that where, in the body of the subscription, there is a stipulation for a particular enterprise, as for the building of a road to a particular place, or for its location upon a specified route, such a stipulation, being outside of the terms of the charter, is in the nature of a condition precedent, and unless strictly complied with by the corporation, the party subscribing is absolved from his obligation to pay. We hold, then, that this instruction was in strict conformity with the law, and upon the state of the evidence, as developed in the record, that it was conclusive of the case.

For the purposes of the foregoing argument, it was assumed that the original charter of the Pensacola and Georgia Railroad Company had been radically changed and altered by the acceptance by the company of the provisions of the internal-improvement act. But if this, upon examination, should turn out to be so in point of fact, it will be readily perceived that such conclusion would not avail the defendant; for, from the view which we have taken of the question involved in the discussion of the fifth instruction, the *onus* of proving affirmatively his dissent to the alleged alteration was upon him. It therefore become unnecessary to the decision of the case to inquire as to the effect of the acceptance of the provisions of the act upon the charter of the company; and we pass to the sixth exception embraced in the assignment of errors, which complains of the instructions given by the court as having been calculated to mislead the jury in the formation of their verdict. We have carefully examined the instructions with reference to this exception, and have come to the conclusion that the defendant has no cause to complain of them in this respect, for they are certainly more favorable to the defense than he was entitled to demand.

It is therefore ordered and adjudged that the judgment of the circuit court of Leon circuit, rendered in this cause, be affirmed, with costs.

PAROL TESTIMONY IS NOT ADMISSIBLE TO VARY TERMS OF WRITTEN CONTRACT, but it may be introduced to explain them: *Iraia v. Ivers*, 63 Am. Dec. 420; *Ratliff v. Ellis*, Id. 471; *Rockmore v. Davenport*, 65 Id. 132; *Summerlin v. Hesterly*, Id. 639; *Sullivan v. McLennans*, Id. 780; *Couper v. Berry*, 68 Id. 468, and collected cases in notes thereto. This rule, however, operates to the exclusion of parol evidence of any prior or contemporaneous agreement to vary the terms or legal effect of the written contract: *Rockmore v. Davenport*, *supra*; or of oral negotiations leading to a written instrument with a view to influence its construction: Note to *Bryan v. Hunt*, 70 Id. 264; *Blossom v. Griffin*, 67 Id. 75, and note to same, considering at some length the surrounding circumstances and pre-existing relations of parties in construing contracts.

ACCEPTANCE OF MATERIAL, RADICAL, AND FUNDAMENTAL CHANGE IN CHARTER will bind only the majority of subscribers who accept it; and a dissenting subscriber will be discharged from his contract of subscription: See cloud of cases cited to this point in the extended note to *Commonwealth v. Cullen*, 53 Am. Dec. 462; *Union Locks and Canals v. Towne*, 8 Id. 32, and note 36; extended note to *Hartford etc. R. R. Co. v. Crosswell*, 40 Id. 358, showing how a stockholder's liability on subscription is affected by amendment of charter.

MAJORITY OF STOCKHOLDERS OF CORPORATION MAY BIND MINORITY by acceptance of altered or amended charter, when: See extended note to *Commonwealth v. Cullen*, 53 Am. Dec. 463, showing what fundamental alterations require the consent of all the stockholders. Amendment of charter will not exonerate previous subscribers, when the change produced is but trifling: *Milford & C. T. Co. v. Brush*, 40 Id. 358. So the obligation of the contract of a corporation with a subscriber to its stock is not impaired by a law extending the powers and privileges of the corporation in accordance with the original design and objects of its organization. Thus, a change in the line of location of a railroad will not enable a stockholder to set up as a defense to an action for his subscription that he subscribed upon condition that the road should be located as originally projected: See note to *Gray v. Monongahela Nav. Co.*, 37 Id. 505. And see, to same effect, *Pacific R. R. v. Hughes*, 64 Id. 285, and note, in which the above principles are discussed at length.

STOCKHOLDER MAY LOSE HIS DEFENSE BY LACHES: See extended note to *Commonwealth v. Cullen*, 53 Am. Dec. 467.

CONDITIONS PRECEDENT TO RIGHT OF CORPORATION TO EXERCISE CORPORATE POWERS must be first performed or waived by shareholders, before the corporation can enforce the stock subscriptions: *Brookville & G. T. Co. v. McCarty*, 65 Am. Dec. 768.

FRAUD AS DEFENSE TO ACTION ON SUBSCRIPTION: See extended note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96-104, discussing a stockholder's liability on his subscription at length; *Olen v. Newcastle etc. R. R. Co.*, 68 Id. 653.

DISTINCTION BETWEEN SIMPLE PARTNERSHIP AND INCORPORATED ASSOCIATION POINTED OUT: *Pacific R. R. v. Hughes*, 64 Am. Dec. 285.

RAILWAY COMPANIES MUST STAND UPON STRICT CONSTRUCTION of their chartered privileges: *Commonwealth v. Pittsburgh etc. R. R. Co.*, 62 Am. Dec. 872.

PROVISIONS OF CORPORATE CHARTER ARE PRESUMED KNOWN TO SUBSCRIBERS to the stock of the corporation: *Wight v. Shelby R. R. Co.*, 63 Am. Dec. 522.

MAJORITY OF CORPORATORS MAY EXERCISE POWERS CONFERRED UPON THEIR BODY BY BY-LAWS OF CORPORATION, WHEN: *Ex parte Willcocks*, 17 Am. Dec. 526; *Despatch Line v. Bellamy M. Co.*, 37 Id. 203, and note; *Elliott v. Abbott*, Id. 227; *Cahill v. Kalamazoo Mutual Ins. Co.*, 43 Id. 458, and note 465; *Edgerly v. Emerson*, 55 Id. 207, and note 221.

WHEN ACT OF MAJORITY WILL NOT BIND MINORITY: See *Peirce v. New Orleans Building Co.*, 29 Am. Dec. 448; *Kinsie v. Trustees of Chicago*, 33 Id. 448; and note to *Downing v. Rugar*, 34 Id. 227, showing how authority delegated to several for public or private purpose is exercised.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

POWELL v. POWELL.

[27 GEORGIA, 23.]

MISTAKE IN VOLUNTARY DEED OF MOTHER TO CHILD, whereby she conveyed to the child the half of lot No. 158, when she intended to convey the half of lot No. 157, cannot be corrected at the instance of said child after the death of the mother, intestate, leaving this and other children.

BILL against administrator to correct mistake in voluntary deed of the intestate, the mother of plaintiff and other children, in conveying to plaintiff the half of lot No. 158, when she intended to convey to him the half of lot No. 157. The other children of decedent were living. The court, on the trial, charged the jury that complainant was entitled to have said mistake corrected and the deed reformed. Defendant excepted to this charge, and makes such exception the basis of this appeal.

Wellborn, Johnson, and Sloan, for the plaintiffs in error.

Blandford and Crawford, contra.

By Court, BENNING, J. Was the charge of the court right? The charge was as follows: "That complainant was entitled to have said mistake corrected and the deed reformed, although the consideration was voluntary."

The deed here meant was doubtless the deed made by Mrs. Powell to Josiah C. Powell, the complainant. The real parties to the question were this Josiah C. Powell, a child of Mrs. Powell, as plaintiff, and the other children of Mrs. Powell as defendants, the latter represented by her administrator. She died intestate. And it was conceded that if Josiah recovered

the land meant (as he alleged) by the deed, he would get more than his share of the mother's estate.

The deed by mistake conveying the half of No. 158 instead of the half of No. 157, the legal title to the half of No. 157 did not by it pass out of Mrs. Powell; and consequently that title, when she died intestate, was cast by the law on her heirs.

The question then is, Was a court of equity authorized to interfere against the legal title thus held by all her heirs in favor of one of those heirs claiming by a defective voluntary deed? And the answer, we think, must be in the negative.

The general principle on this subject governing courts of equity is, that where the equities are equal the legal title prevails.

In the present case, if there is any difference in the equities, it is a difference in favor of the heirs of Mrs. Powell, and against her voluntary donee. It is the dictate of equity and natural justice that one's property should be bestowed on one's children rather than on strangers; and on those children equally rather than unequally. This is certainly so, if our statute of distributions be taken as the exponent of what is equity and natural justice; for that makes estates go to the intestate's children, and puts the children all on an equality. According to this, then, equity would say to Josiah that he ought to be content to stand on the same footing with his brothers and sisters. They, in addition, have the legal title. If, then, the general principle is to govern, they must be allowed to prevail over him.

Is there anything to take his case out of the general principle? It is said that there is. It is said, in the first place, that the case of a voluntary conveyance in favor of a wife or children is an exception to that principle. But we are not prepared to admit this proposition. The English decisions seem to be against it: See 1 Story's Eq. Jur., sec. 176, and cases cited; Adams's Eq. 78. And if we were, this is not a deed in favor of children; it is a deed in favor of a child, at the expense of the children.

In the second place, it is said that this case is like that of *Wyche v. Greene*, 16 Ga. 49, and that in that case this court ordered the mistake in the deed to be corrected. But this case is not like that. In that case, taken as presented to this court, the contest was between parties all of whom claimed under the very deed sought to be corrected.

According to the bill filed by some of the children against

Mr. Greene, the father, he held under the deed under which they claimed. That deed, they insisted, was intended to be a deed giving a life estate to Mrs. Greene, and, by consequence, to him, Mr. Greene, and the remainder to her children—an intention which they alleged was, by mistake, defeated, so far as the children were concerned, the deed being, by mistake, so expressed as to give the whole interest to Mrs. Greene. Mr. Greene, they insisted, was holding under this very deed. If he was, then he was bound to let the deed have full effect, whether it was a deed with or without a valuable consideration; for it is a principle of law, that he who elects to claim under an instrument must let the instrument have its full operation. The law will not suffer him to set up so much of it as makes in his favor and reject the rest. By his election to claim under the instrument, he himself gives it validity in all its parts. If Mr. Greene had been claiming by inheritance, through his wife, the case would have been more like the present. The defendants to the present bill claim as heirs of Mrs. Powell. They do not claim under the deed made by her to Josiah C. Powell, their brother.

We see nothing, then, to take the present case out of the general rule, that when the equities are equal the legal title prevails. Consequently we think that the court below erred in its charge to the jury.

New trial granted.

DEED, WHEN REFORMED FOR MISTAKE: See *Ruffner v. McConnel*, 63 Am. Dec. 362, and cases cited in note 365.

THE PRINCIPAL CASE IS CITED in *Perkins v. Keith*, 33 Ga. 528, to the point, mentioned in the opinion, that it is no objection, in the mouth of an administrator, to a bill by an equitable owner for a conveyance of the legal title, that the bill seeks enforcement of the decedent's voluntary agreement to convey.

HENDRICK v. DAVIS.

[27 GEORGIA, 167.]

STATUTE DECLARING THAT SHERIFF, IN MAKING SALE ON EXECUTION, SHALL ADVERTISE SUCH SALE in three of the most public places of the county is directory only, and if the sheriff omit to do so, such omission does not vitiate the sale; but any person injured by such omission has a remedy against the sheriff in an action for damages.

IN ACTION FOR REFUSING TO COMPLY WITH TERMS OF SHERIFF'S SALE against the person who bid off the property, he cannot set up as a defense that a deed was exhibited at said sale, and asserted to be a conveyance of the property sold, if such deed was not examined nor read by him.

IN ACTION FOR REFUSING TO MAKE GOOD BID AT SHERIFF'S SALE, in order to enable defendant to assign as error the refusal of the court to admit in evidence representations and statements made by the sheriff at such sale, the record must show what such representations and statements were.

IN ACTION AGAINST PERSON WHO REFUSED TO COMPLY WITH TERMS OF SHERIFF'S SALE, in order to hold him liable for the difference between the price at which he bid off the property and the price at which it was subsequently sold, the same property must have been resold, and resold as the property of the identical parties as whose property it had been bid off by him.

ASSUMPSIT. The facts are stated in the opinion.

Perkins and E. H. Beall, for the plaintiff in error.

Hood and Robinson, contra.

By Court, McDONALD, J. The defendant in the court below, who is the plaintiff in error here, was sued by the sheriff, for the use of Lodwick E. Lard, to recover the difference between the price at which the defendant had bid off certain property at sheriff's sale, he having refused to comply with the terms of sale when required to do so, and the price at which the property was afterwards sold. The suit was brought under the act of 1831: Cobb's Dig. 513.

On the trial, the plaintiff in the court below introduced the deputy sheriff as a witness. The counsel for defendant proposed to ask him if the land had been advertised in three of the most public places in the county. The question was objected to and the objection sustained, and error is assigned on that decision. It is made the duty of the sheriff to advertise the sales of property levied on by him in three of the most public places in the county. This is merely directory to the sheriff, and his failure to do it does not vitiate the sale. But if the omission of this duty should result in injury to any one, the injured person would no doubt have an action against him to recover damages commensurate with the injury sustained.

We do not see the relevancy of the deed of Douglass, offered in evidence, to the issue between the parties. A deed was exhibited at the time of the sale, said to be a deed to the property that was selling. But that had nothing to do with the matter before the court. The defendant did not examine it, and he cannot claim to have been misled or prejudiced in any way by its exhibition. He was content to purchase by the levy and advertisement. The court very properly rejected the deed.

In regard to the third assignment of error, I will remark

that it nowhere appears in the record what had been the representations and statements made by the sheriff about the property and what he was selling, and this court has, therefore, no means of determining whether the court erred in ruling them out. Error is not to be presumed.

The defendant's counsel moved to withdraw from the jury the levy upon the *fi. fa.* in favor of E. H. Martin against L. E. Lard and M. D. Hendrick, makers, and Thomas Douglass and William T. Callier, indorsers, deciding that said levy on said *fi. fa.* authorized the sheriff to make sale of the one-third interest of either of the said defendants separately, in and to the property levied on. Error is assigned on this decision. In determining this assignment of error, we refer to the principles upon which the plaintiff's suit depends. The plaintiff in error had purchased, at the sheriff's sale, the interest of two of the defendants in the third part of the property sold. He bid it off at one thousand eight hundred and ten dollars. He refused to comply with the terms. The property was advertised subsequently, and sold for one thousand dollars, as the property of Lodwick E. Lard only. For Hendrick to be liable, the same property must have been resold, and resold as the property of the identical defendants as whose property it had been bid off by him. If it had been offered the second time as the property of both defendants, and especially if each owned a third, who can say that the property would not have sold for the amount of Hendrick's bid? The decision of the court must be construed to mean that notwithstanding the sheriff offered for sale the interest of two defendants, and it was bid off by Hendrick, he, not having complied with the terms of sale, must be held liable for the difference between his bid and the price at which it was sold at the second sale as the property of one defendant only, inasmuch as the sheriff was authorized by the levy to make sale of the one-third interest of either of the defendants separately in the property levied on. The question in the case was not on the authority of the sheriff to sell, but upon the liability of the defendant below to respond for the difference between his bid and the price of the second sale, when he had bid off the interest of two of the defendants, and the subsequent sale was of the interest of one only. The decision was wrong in reference to the facts of this case and the law of the defendant's liability.

A matter appears in the record, but on which no point seems to have been made in the court below, and there has been no

allusion to it here. The plaintiff in error, as repeatedly already remarked, bid off the interest of two of the defendants in the property offered for sale; when the sheriff demanded of him a compliance with the terms of sale, he tendered a deed conveying the interest of one of them only.

We reverse the judgment on the fourth assignment of error appearing in the record, for the reasons stated.

Judgment reversed.

RESALE OF LAND ON FAILURE OF PURCHASER AT JUDICIAL SALE TO COMPLY WITH CONDITIONS of first sale, how conducted, and liability of purchaser at first sale: See *Shinn v. Roberts*, 43 Am. Dec. 636, and note thereto.

ELMORE v. SPEAR.

[27 GEORGIA, 198.]

SINGLE CREDITOR MAY FILE BILL FOR DISCOVERY AGAINST DEBTOR to enable him to reach legal assets, and if he thereby gains a priority over other creditors, he will be entitled to retain it.

SINGLE CREDITOR IN PURSUIT OF LEGAL ASSETS CANNOT BE FORCED TO DIVIDE with other creditors, nor compelled to make other creditors parties to his bill in equity to enforce his legal right.

BILL in equity against Wiley Spear, John Spear, Samuel M. Strong, and Davis Gamage. The bill states that Wiley Spear, being indebted to his son John Spear, gave him his promissory notes for two thousand and twenty-five dollars, and that John Spear, in the course of business, transferred and indorsed them to plaintiff; that John Spear then absconded, but at about that time he placed in Strong's hands certain negroes to be converted into money; that certain of said negroes were sold to Gamage, and that Gamage and Strong, in purchasing the negroes, or in dealing with them, had full knowledge of the facts. Complainant then asks for a judgment against Wiley Spear, and asks that Gamage and Strong be compelled to account and pay to him the money realized from the sale of said negroes, and otherwise account to him as trustees for John Spear. Defendants, on the trial, moved to dismiss the bill, on the ground that it was a creditor's bill, and that complainant was prosecuting it in his own name alone, and that it was necessary that Wiley Spear's other creditors should be made parties. The court ordered the complainant to amend so as to make such other creditors parties, or make them an offer to come in as parties.

Miller and Hall, for the plaintiff in error.

Cook and Montfort, contra.

By Court, McDONALD, J. This is not technically a creditor's bill. The assets which the creditor proposes to reach are not equitable but legal assets. The only circumstance which authorizes the complainant to go into chancery is his inability to identify the property or make the necessary proof to sustain a remedy at law, which otherwise would be adequate without a discovery from the defendant, which he avers to be necessary. A single creditor may file a bill to reach legal assets, and if he gains thereby a priority over other creditors, he will be entitled to retain it: 2 Daniell's Ch. Pr. 204, etc.; 1 Story's Eq. Jur., sec. 546, etc.

The defendant in such cases has no interest in the question so far as the rights of the creditors among themselves are concerned. If the complainant succeeds in holding the defendant to account, the costs must be paid from the fund, and expenses also, except those incurred by the defendant in sustaining his purchase, or his right to retain the amount actually paid by him. The creditors are not moving here to be made parties; not even Boetick, whose evidence was taken in this case, and who must of course know of the entire proceeding. The complainant may control his own case: *McDougald v. Dougherty*, 11 Ga. 988. And when a single creditor is in pursuit of legal assets, he cannot be forced to divide with other creditors. It is otherwise with equitable assets. In this case the bill alleges that the defendant holds the property in trust for complainant and other creditors, but it discloses also that the trust arises from the alleged fraud of the defendant and is implied in law, and not that there was any trust created by contract for the payment of creditors.

Judgments reversed.

HARDAWAY v. DRUMMOND.

[27 GEORGIA, 221.]

IN SUIT BY ADMINISTRATOR OF ESTATE FOR BENEFIT OF HEIRS AT LAW,
RECOVERY BY OR AGAINST the latter may be pleaded in bar, there being
no debts due or owing by the intestate.

ACTION by heirs at law of Robert Drummond, an idiot, against Robert S. Hardaway, who was security on the bond of George S. Hardaway, administrator of the estate of John Drum-

mond, the father of said idiot. The action was brought for an accounting and payment to the plaintiff of the value of property which it is alleged William F. Drummond, the guardian of the said idiot, and the defendant Robert S. Hardaway, who was security on William F. Drummond's bond, and George S. Hardaway by collusion and conspiracy, fraudulently withheld from said idiot and his heirs. The point raised on this appeal is that the administrator of William F. Drummond should have been made a party to this bill.

Dougherty, for the plaintiff in error.

Holt and Hutchins, and B. Hill, contra.

By Court, LUMPKIN, J. This case has been up before (see 21 Ga. 433), and the only new point presented is that the administrator of William F. Drummond, with whom it is alleged the defendant fraudulently settled for the property of the idiot, is not made a party to the bill.

William F. Drummond died many years ago. He is unrepresented, and his estate is insolvent. Why make his administrator a party? It is argued that the protection of Robert S. Hardaway requires this to be done. Otherwise an administrator might at some future time be appointed who might recover this property.

The heirs of the idiot are the complainants in the bill; and a decree against them could be pleaded in bar of any suit brought by an administrator for their benefit—there being no debts owing by the idiot. This court has often recognized and enforced this doctrine, in attempts which have been made to recover property indirectly through the representative of an estate, for the benefit of the heirs, when the heirs themselves were barred.

Judgment affirmed.

PHILLIPS v. LAMAR.

[27 GEORGIA, 228.]

SHERIFF COLLECTING MONEY, AND OF HIS OWN ACCORD DEPOSITING IT IN BANK which subsequently fails, is personally liable to the plaintiff in execution therefor.

RULE against sheriff to show cause why he should not pay over to plaintiff the amount due on a *fi. fa.* The defendant answered that he had collected the amount on the writ and had deposited it in the Columbus Bank, and that it was ready

to be paid to plaintiff upon demand, but that before said demand the bank failed; that said money is to defendant's credit on the books of the bank, and that he offers to give plaintiff a check upon said bank, or assign the same to him. After hearing, the rule was discharged, and plaintiff appealed.

R. W. Denton, for the plaintiff in error.

Wiley Williams, contra.

By Court, McDONALD, J. The law makes the sheriff the collecting officer under final process of the courts, and it holds him liable to a stringent and summary liability. If he fails to do his duty according to the exigency of the process in his hands, the plaintiff is not compelled to resort to the tardy remedy of an ordinary suit, but he may proceed against him by rule, as for contempt, and coerce the payment of the money *instantly*, which he ought to have in court, and would have had but for his misconduct.

The strictness of the law as enacted by our legislature, and as enforced by our courts, in regard to sheriffs, grows out of the important relations which that officer sustains to the community, as the executor of the final judgment of the law. The interests of every litigant who obtains a judgment in the court must necessarily be committed to his hands, if the judgment cannot be otherwise enforced than through the use of the process of the courts. The courts of Georgia had ever held (prior to the passing of the act of 1839 to make valid certain bonds, Cobb's Dig. 534 and 535), where I have practiced before the establishment of this court, that contracts made by sheriffs with defendants, whose property had been taken in execution, for leaving the property executed in their hands, were void for ease and favor, as being against the policy of law. The act referred to validates contracts as between sheriffs and other officers named therein, and defendants made for the above purpose; but such contracts, it is expressly declared, shall not affect the rights of plaintiffs or their remedies against sheriffs and other officers.

This act expresses strongly the legislative mind that private arrangements made by sheriffs, who are officers of the law, with defendants whose property they may have levied on, for the forthcoming of the property, shall not prejudice the interest of plaintiffs. It certainly cannot be held that contracts or arrangements in regard to the money by sheriffs, after it is in hand, by means whereof it is exposed to loss and ultimately

lost, can be allowed to exonerate them from liability and throw the loss on plaintiffs. The process requires them to have the money in court, and after having collected it, nothing but inevitable accident can relieve them from liability. The sheriff had collected the plaintiff's money, and without authority from him, and of his own accord, had placed it on deposit in bank as sheriff. It was put in bank on general deposit. Such a deposit creates the relation of debtor and creditor between the bank and the depositor. It is not a bailment, for the bank has a right to use the deposit as its own money, and is liable to pay on demand, and no interest accrues but from the time of demand and refusal to pay. It is a loan. In the case of *Browning v. Hanford*, 5 Hill, 591 [40 Am. Dec. 369], it was held that the sheriff, after levying on the goods of a defendant and having deposited them with a person solvent and responsible, who receipted to him for them, was not liable, the goods having been casually burned and without fault. The solvency of the receptor was not questioned. Judge Cowen, in delivering his opinion, seems to have thought that if there had been any doubt of the ability of the receptor of the goods in that case, the determination would have been different, and remarks very truly that the sheriff was under no obligation to deliver over the goods, and must see at his peril that the substituted security be available. And again: "It is of the nature of every trust that when the trustee parts with the fund and takes a substituted security, he is guilty of a conversion, and must answer at all events." It is difficult to perceive on what principle the case was decided as it was.

I will remark that it cannot be recognized as law here. Our statute, which authorizes sheriffs to take bonds for the forthcoming of property on the day of sale, but holding the sheriffs, nevertheless, liable to plaintiffs if the property should not be produced, forbids it. I repeat, I do not see how the case can be supported on principle. It seems to me that the analogies referred to are not apposite, and are therefore not good authority for it. The case of a factor *del credere* is not the case of a public officer on whose faithful conduct the whole community are forced to rely for the attainment of their rights through the courts, and a receiver is a special officer of a court of chancery.

A man has a choice in the selection of a factor, but not so of a sheriff; and a receiver is under the order and control of the court to which he owes his appointment, and is accountable as

that court shall order and direct. If a sheriff can excuse himself, by delivering over property taken in execution by him to the custody of an individual of ability to pay for it, if it be not forthcoming to answer the plaintiff's demand, and it be casually lost, plaintiffs are subjected to injury and loss at the hands of those in whom the law does not require them to confide. But the same learned judge, whose remarks I have already quoted, says that "no case goes the length of saying that if the goods be destroyed without any fault of the sheriff, the plaintiff shall not be entitled to sue out a new execution, or the sheriff to make a new levy." I would say it would be an extremely hard case for the defendant to be subject to a second levy, and of consequence to a second payment of the debt, if his property sufficient to satisfy it had been taken in execution and lost or destroyed without his fault. I cannot regard that as sound law.

Sheriffs cannot force on plaintiffs the risk of the solvency of any bank in which they may choose to deposit money which they collect. That risk is their own. There are not banks in every county where sheriffs may deposit money collected by them. If a sheriff in a city may loan money collected by him to a bank, and every general deposit is a loan, a sheriff in the country may loan to an individual in good credit at the time, and if the failure of the bank should excuse the city sheriff, the failure of the individual ought to protect the country sheriff. This court cannot countenance or affirm a rule apt to operate so injuriously to plaintiffs. The sheriffs will run but little risk if they make the plaintiffs or their attorneys the depositaries of their own money, which may generally be done with the slight inconvenience of notifying them by mail or otherwise that the money is collected, and ready to be paid.

Judgment reversed.

SHERIFF COLLECTING MONEY, AND OF HIS OWN ACCOUNT DEPOSITING IT IN BANK, becomes personally liable to plaintiff in execution therefor: *Shaw v. Bowman*, 34 Ohio St. 32, citing the principal case.

STANFORD v. PRUET.

[27 GEORGIA, 242.]

STATUTE OF ANOTHER STATE CAN BE PROVED IN GEORGIA only by a certified copy.

WHERE CREDITORS AGREE TO TAKE NOTE FOR DEBT, IF INDORSED by a certain person residing in another state, and in pursuance thereof, a note is drawn, dated at Columbus, Georgia, and is carried by the makers to

Alabama, where such party indorses it, and returns it to the makers, who deliver it to the creditor in Georgia, such indorsement is a Georgia, and not an Alabama, contract.

ASSUMPSIT. The opinion states the facts.

Wellborn, Johnson, and Sloan, for the plaintiff in error.

Dougherty and Laws, contra.

By Court, LUMPKIN, J. Can the laws of another state be proved in this, by a book purporting to contain those laws, and to be published by authority of the other state?

It is conceded that they cannot be at common law; but that an exemplified copy of the statute must be produced. In the state courts there is a conflict of practice upon this subject; an overwhelming majority adhering to the common-law rule. It would be a great convenience to admit the book as evidence. We admit their reports without questioning their authenticity. And we often form our judgment upon the citation of state statutes in these reports. Still I am not prepared to say that we are authorized to depart from the common-law rule without legislation, when the point is made and insisted upon. I trust the legislature will interpose and regulate this matter. It puts parties to unnecessary delay, expense, and trouble, and for no compensating benefit. It is much easier in this age of sleight of hand to forge the exemplification of a statute than to palm off a spurious book upon the courts. And especially should this courtesy be extended to our next-door neighbor, Alabama, where Cobb's Digest is constantly read as evidence of our law, without objection.

Is the indorsement of Pruet an Alabama or a Georgia contract? The note was for a debt due to the plaintiff by Strippling & Alley. He resided at Columbus, Georgia, where the note is dated, and required city security. Stripling & Alley refused to give it, but promised to give the defendant Pruet. Alley took the note to Midway, Barbour county, Alabama, where Pruet indorsed it, returned it to Alley, one of the makers, who delivered it to the plaintiff at Columbus.

Had Alley been the agent of Stanford to get the indorsement, a delivery to him in Alabama would have been a delivery to Stanford. And that would have been the case of *Levy v. Cohen*, 4 Ga. 1, where we held that the deposit of the note in the post-office at Savannah was a delivery to the plaintiff there, the mail being the common agent of the contracting parties for that purpose. In *Cox v. Adams*, 2 Id. 158, the contract of in-

dorsement was complete in Alabama; and of course, governed by the laws of that state.

But here Alley was not representing Stanford, but acted for himself and Stripling. He was not bound to deliver this note at all. He would have violated no obligation, been guilty of no breach of trust, had he failed or refused to do so. His creditor agreed to this arrangement, provided the debtor would make it. Still he might, even after the note was indorsed and returned to him, have repented or changed his mind; and adjusted his liability in some other way. It was his paper, and optional with him to deliver or withhold it. The contract was not binding, and consequently, not consummated until the delivery of the note to Stanford at Columbus. This being so, was not the note made and indorsed at Columbus, and therefore to be considered a Georgia contract, as much so as if Pruet had actually and manually indorsed it there, or had written his name in blank, to be filled up at Columbus by Alley, his agent? We think so.

Judgment reversed on first ground.

McDONALD, J., did not sit in this case.

FOREIGN LAWS, PROOF OF: See *Owen v. Boyle*, 32 Am. Dec. 143, and note 148; *Buford v. Holliman*, 60 Id. 223, and note; *Blystone v. Bargett*, 68 Id. 353, and note 661.

TAYLOR v. BALDWIN.

[27 GEORGIA, 433.]

TIME IS NOT OF ESSENCE OF CONTRACT, UNLESS THERE ARE Words clearly showing such an intention.

CONDITION OF CONTRACT FOR PURCHASE OF LAND, that party let into possession may purchase on payment of a certain sum of money, time not being of the essence of the contract, would entitle the party to make such payment within a reasonable time after the commencement of an action in ejectment.

BILL in equity to enjoin action of ejectment. The facts are stated in the opinion.

Hood and Robinson, for the plaintiff in error.

Douglass and Douglass, and *E. H. Beall*, contra.

By Court, **BENNING, J.** The question is, whether the second charge of the court was right. That charge amounts to this, that time was not of the essence of the contract; that although

Baldwin did not offer to pay the purchase-money on the day it fell due, yet the contract of purchase still subsisted, and he had still a reasonable time within which to pay that money. Was this charge right?

The general principle, no doubt, is, that in equity time is not of the essence of the contract. That this is true of mortgages and bonds with penalties is familiar doctrine. Indeed, it is true at law, of bonds with penalties; and we may say also of mortgages in this state, for in this state we may, if not must, foreclose mortgages at law.

And I think it doubtful myself whether the conclusion to be drawn from the English authorities, as they at present stand, is not that time is in no case of the essence of the contract. I think it is certain that they at least do not go further than this, that it is possible so to frame a contract that time shall be of its essence.

Conceding, however, that a contract may be so framed that time shall be of its essence, the question is whether the contract in the present case was so framed.

What is the test? This, I suppose, we may say, that the words shall be such that they clearly show the intention to be that time shall be of the essence of the contract: 2 White & Tudor's Lead. Cas. 19; and what words will be sufficient for this? Words at least as strong as these: "That the agreement shall be void unless the purchase be completed on a certain day:" *Id.*

Are there any such words in this agreement? There are not. This agreement is evidenced by a bond for titles, and the condition of that bond is as follows: "The condition of this obligation is this, that if the said Benjamin Crabb shall make, or cause to be made, to the said Baldwin a good and sufficient title to lot No. 142, when the said Moses F. Baldwin shall have paid to the said Crabb the sum of one hundred and fifty dollars, which payment is to be made by the twenty-fifth of December, that then the above bond or obligation shall be null and void, otherwise to remain in full force."

There is nothing in these words importing that the contract of purchase was to be void if the purchase-money was not paid on the appointed twenty-fifth of December. They merely say that the vendor's bond shall be void when he makes a title; and that he must make a title when the purchase-money is paid, and that the purchase-money is to be paid on the twenty-fifth of December. They do not go further, and say that if

the purchase-money is not paid on that day the contract of the purchase is to be void.

We think, then, that these words, taken by themselves, are not sufficient to show it to have been the intention that the contract of purchase was to be void unless the purchase-money was paid on the twenty-fifth day of December.

And this view from the words is confirmed by the conduct of the parties. Baldwin, the purchaser, went into possession at the time of the purchase, and he and his assignee, Du Bose, have remained in possession ever since.

In this conduct, Crabb and his assignee, Taylor, acquiesced until the bringing of the ejectment, which was brought only a short time before the commencement of the bill. They did not complain; they did not demand repossession of the land, or of the bond for titles; they did not offer to return the note given for the purchase-money until they came to answer the bill. All this goes to show that the parties themselves interpreted their contract as not meaning that time was to be of its essence.

We think, then, that the court was right in the part of its charge in which it told the jury that time was not of the essence of the contract.

Was the court also right in the other part of its charge, in which it told the jury that Baldwin was entitled to a reasonable time within which to pay the purchase-money? We think so. This part of the charge was but a corollary from the first part. So if that was right, this was, of necessity, right. This indeed was, I believe, not disputed.

The first charge was in favor of the plaintiff in error. The two charges are all the decisions stated in the bill of exceptions.

There was no motion for a new trial. Therefore the action of the jury cannot come before this court; consequently, there can be, for this court, no further question in this case.

Judgment affirmed.

McDONALD, J., did not preside in this case.

TIME, WHEN OF ESSENCE OF CONTRACT FOR SALE OF LAND: See *Green v. Covilland*, 70 Am. Dec. 317, where this doctrine is extensively discussed, and see cases in note 739; *Hall v. Delaplaine*, 68 Id. 57, and note 65.

WILLIAMS v. CASH.

[27 GEORGIA, 507.]

DEFENDANT IN EJECTMENT ENTERING ON LAND SUED FOR, under plaintiff's lessor, whether by purchase, gift, or lease, cannot dispute the title under which he entered.

IF DEFENDANT IN EJECTMENT SETS UP DEFENSE HOSTILE TO TITLE UNDER WHICH HE ENTERED, he cannot afterward claim to be a tenant at will and entitled to notice to quit before suit.

STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN in favor of a person who entered into the possession of premises under a contract for title, so as to constitute an adverse possession, until he has repudiated such contract, and claimed to hold in defiance of the title under which he entered, and the party under whom he entered has notice of such adverse holding.

EJECTMENT. The opinion states the facts.

Milner and Parrott, for the plaintiff in error

Wofford and Crawford, contra.

By Court, McDONALD, J. This was an action of ejectment in the superior court of Cass county. The jury rendered a verdict for the plaintiff, and the defendant moved for a new trial, on the several grounds set forth in the foregoing statement by the reporter. The presiding judge refused to grant a new trial, and error is assigned on his judgment refusing it. According to the record before us, the defendant entered into possession of the premises sued for under the lessor of the plaintiff, Jesse Cash, either under a verbal donation or of a promise to give the land to the defendant, or to his wife, or to his wife and children, or under a lease, he to pay rent in corn or cotton. There is some evidence to each of these points, but the weight of the evidence is that he entered into possession of the land under a verbal promise that as soon as certain impediments were removed he would execute a title to the defendant's wife and children. If the defendant entered under the lessor of the plaintiff, whether by purchase, gift, lease, or otherwise, he cannot dispute his title: Leigh's *Nisi Prius*, and cases referred to in the note 925. So far, then, as the plaintiff's right to recover the premises in dispute depended on the evidence adduced by him, it was perfect as to the defendant.

The defense of adverse possession for a period that would bar the plaintiff's right of action was set up. This defense was inconsistent with a tenancy at will, and it was not necessary for the plaintiff to prove notice before he brought the suit, that he had determined his will.

The case of the plaintiff in error, then, depends on the merits of his defense under the statute of limitations, and these merits may be fully examined on the errors assigned, upon the refusal of the court below to charge the jury as requested by the counsel for the plaintiff in error, and upon the charge of the court as given to the jury.

The counsel for the plaintiff in error requested the judge presiding at the trial to charge the jury that if the defendant (plaintiff in error) went into possession of the land as his own, with the understanding that the lessor of the plaintiff should execute to defendant's wife a conveyance, that does not constitute him tenant at will of the plaintiff, and does not prevent the statute of limitations from running.

It is by no means clear that the evidence in the cause warrants the charge; but the request is inconsistent with itself, for the defendant could not enter into possession of the land as his own while he acknowledged the title out of him by stipulating that a conveyance should be executed to his wife by the person claiming title. But the request is substantially wrong, and ought not to have been given in charge to the jury, for "a party who has been let into the possession of land under a contract of sale, or for a letting which has not been completed, is a tenant at will of the vendor:" *Ball v. Cullimore*, 2 Crompt. M. & R. 122; *Dunb v. Hunter*, 7 Eng. Com. L. 115. The request implies that the title to the land was in the lessor of the plaintiff, and that a conveyance was necessary to pass it out of him. If the defendant entered under a contract of any sort for a title, the statute of limitations could not begin to run in his favor until he repudiated the contract and claimed to hold in defiance of plaintiff's title and the plaintiff's knowledge of such adverse holding.

The court charged the jury that if the defendant, previous to the year 1852, took possession of the land, claiming it as his own, and kept that possession, and continued that claim for seven years, the defendant acquired a good statutory title, and the jury ought to find for the defendant. This charge is certainly as favorable to the defendant below, under the evidence in the record, as he could have asked. But the court proceeded to charge the jury further, that if the defendant took possession of the land under a promise from the plaintiff to execute a conveyance to the defendant's wife and children, the statute would not run until the plaintiff had notice that the defendant claimed the land in hostility to the plaintiff, and

this charge is also assigned as error. We are in a court of law, and the cause must be decided on legal principles. We express no opinion upon the right of the defendant below, and his wife, if he can establish satisfactorily a contract of the sort alluded to in this charge, and that he entered and made the improvements under that contract, which are testified to by some witnesses, as stated in the record, to have said contract executed. But the contract as here stated, a promise to execute a conveyance to the defendant's wife and children, admits the legal title to the land to be in the lessor of the plaintiff, and if the defendant took possession of the land under such promise, he recognized the title under which he entered, and the statute cannot run in his favor until he gets clear of the force and effect of that recognition by assuming an adversary position to it, with notice to the party under whom he entered. We think, therefore, that in no aspect in which we have been able to view this case, under the proofs before us, can the plaintiff maintain either a title or possession under the statute of limitations.

Judgment affirmed.

VENDEE IN POSSESSION, ESTOPPEL IN EJECTMENT TO DENY VENDOR'S TITLE: See *Seabury v. Stewart*, 58 Am. Dec. 254, and note. The principal case is cited in *Miller v. Larson*, 17 Wis. 625, to the point that the relation of vendor and vendee is so much in the nature of a tenancy that the purchaser is estopped from denying the vendor's title so long as he retains possession under their agreement of sale.

EAST TENNESSEE AND GEORGIA RAILROAD COMPANY v. WHITTLE.

[27 GEORGIA, 535.]

RAILROAD COMPANY IS NOT LIABLE IN DAMAGES, AS COMMON CARRIER, to one who hires or charters cars absolutely, in case of injury to his property. The remedy of the latter must be on the contract of hire, and the implied undertaking of the company that the hired cars are substantial, and will be duly carried to their destination.

CASE. The opinion states the facts.

D. A. Walker, for the plaintiff in error.

C. D. McCutchin, contra.

By Court, McDONALD, J. The plaintiff in error was sued as a common carrier in the court below, and the proof established the fact that the defendant in error chartered of the said plain-

tiff two box-cars for the transportation of hogs from Cleaveland, in Tennessee, to Dalton, in Georgia. The hogs were put on board the cars at Cleaveland, were shut up, and many of them suffocated on that night, before the train of cars was put in motion on its trip.

The principal question arising upon the pleadings and evidence and the rulings and decisions in this case is, whether the plaintiff in error is liable for damages as a common carrier.

A railroad company, from the nature of its occupation, is a common carrier, unless there is something in its charter to relieve it from the heavy responsibilities of that character. It is conceded that there is nothing in the charter of the plaintiff in error to restrict or limit its liability in that respect. But because it is a common carrier, and has an exclusive right of transportation of passengers and freights over its road, in its own cars, and by means of its own motive power, does that deprive it of the right to charter or hire an entire train, or any part of it, to another company or an individual? If it does not, and it charters the whole or a part of its train, so as to give up the possession of the part chartered to the charterer, is the company liable, as a common carrier, for damages or injury to property put into the chartered cars?

A ship may be chartered in whole or in part to another: Abbott on Shipping, Story's ed., 210. Whether the owner or charterer is liable as a carrier for the damage depends on the terms and construction of the charter-party, etc. That depends entirely on whether the owner of the vessel or the charterer has possession of the merchandise or commodity to be transported. There must be a trust and confidence in the owner, manifested by the delivery into his possession of the article to be transported, before he can be charged as a common carrier. In the case of *East India Company v. Pullen*, 1 Stra. 690, where the defendant was sued as a common lighter-man on the Thames, it was the usage of the company to place an officer, called a guardian, in the lighter; the court held that "it altered it from the common case, there being no trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself." In most of the cases which have arisen under charter-parties in England, the principal question arising under the construction of the contract has been "whether there was an entire letting or parting with the ship for given purposes, so that during that

time the owner had no efficient control, but the charterer had the full disposition of the ship:" Paah, J., in the case of *Christie v. Lewis*, 6 Eng. Com. L. 410. If there was an entire letting or parting with the ship, the charterer became the owner for the time, and the ship was delivered to him, and not the freight to the owner. If the ship is chartered or hired in a manner that the charterer shall retain the possession of his own merchandise or articles for transportation, the owner of the ship can have no lien thereon for the freight or the payment of the sum stipulated for the use of the ship, for there can be no lien where there is no possession. When the owner of the ship has neither the possession of the articles to be transported nor a lien for freight, as to them he cannot be a common carrier. But it is said there is a difference between the chartering or hiring of a ship and of a railroad car; that the charterer of a ship may sail where he pleases on the seas, and there are no exclusive rights and privileges to limit his power or control his movements; but in respect to the charterer or hirer of a railroad car it is not so. Grant it that there is a difference; that does not restrict the right of the parties to make a contract, and if it be a contract which violates no principle or policy of the law, it will surely bind the parties to it; and if the parties make a contract, and it be in relation to a new condition of things, it must be construed by known and established principles, applied to such new state of things. A railroad train is made up of separate cars, cars capable of being let or hired separately, but all are necessarily obliged to pass over the same route, and to be drawn by the same power. The power which moves it from place to place is owned by the proprietors of the road, unless the whole train with the power and employees be let, and then the ownership is temporarily changed. If the whole train, including motive power, or a part of the train, be absolutely chartered or hired to another for a particular trip, or from one place to another, without further stipulation expressed, and the possession is delivered, that other becomes the owner for the time, and has the right to control the freighting and loading of the chartered or hired cars. There is always and must be in such contracts certain implied undertakings by both parties: on the part of the hirer, that he will not overload the car or freight it in a manner to injure it, etc.; on the part of the owners, that the car is in good condition and substantial; that it will be carried safely, and in the usual time, to the point of its destination; that if laden with stock, time and opportunity will be afforded to give

hiring as the evidence in this case, in one aspect of it, presents; for the charge and the requests to charge must be understood in reference to the proof in the case. It will be understood that if there was no contract of charter or hire other than what is to be inferred from the published rates and rules of transportation as given in evidence by the plaintiff in error, then the plaintiff in error is liable as a common carrier; but we must construe the charge and the requests to charge by the proofs as exhibited in the record, and two or three of the witnesses prove that there was a chartering or hiring of the cars. Judgment reversed.

RAILROAD, WHEN LIABLE AS COMMON CARRIER: See the cases cited in the note to *Chevallier v. Stratham*, 47 Am. Dec. 651, where the doctrine laid down in the principal case is considered and discussed.

LEE v. CATO.

[27 GEORGIA, 637.]

PURCHASER OF LAND WITHOUT NOTICE, FROM ONE WHO PURCHASED WITH NOTICE of a prior unrecorded deed, acquires a good title if the old deed is still unrecorded at the time of the conveyance to the former.

EJECTMENT. The opinion states the facts.

Walker and Underwood, for the plaintiff in error.

J. R. Brown and Milner, contra.

By Court, LUMPKIN, J. The only question we deem it our duty to consider and decide in this case is this: Concede that George W. Slappey bought of Daniel Cato, the orphan of John Cato, deceased, with notice of the prior unrecorded deed, made by Daniel Cato to Elijah Johnson, and sold to Samuel Rutherford, who had no notice of the conveyance to Johnson: is Rutherford protected in his purchase?

As between Johnson and Slappey, the two immediate grantees of Cato, the act of 1837 declares that Johnson's title shall prevail. That act settles nothing beyond this; and such was the general decisions of our state courts before that act was passed. A departure from this doctrine led to the passage of this act, as I am induced to believe from information derived from one of the old circuit judges. And so far as we are advised, the adjudications were equally well settled and uniform upon the other point; namely, that if A buys land of B, and takes a

deed which he fails to record in time, and B subsequently sells the same land to C, who records his deed in time, with notice, and C conveys to D without notice of A's deed, and both C's and D's deeds are registered within the twelve months, that D has priority over A.

Without citing any other authority, which is scattered broadcast over the books of reports, we rest our judgment upon the case of *Truluck v. Peebles*, 3 Ga. 446. That case, it is true, was not decided under the act of 1837. But, as we have already said, the point we are discussing is not provided for by that act. But *Truluck v. Peebles*, *supra*, was referred to and affirmed in *Herndon v. Kimball*, 7 Id. 432 [50 Am. Dec. 406]. And this latter decision was upon a deed made in 1839.

The facts of the case in 3 Georgia were identical with the facts in this case. The learned judge (Warner), in delivering the opinion of the court, says: "It is a settled rule that if one affected with notice conveys to one without notice, the latter shall be protected equally as if no notice ever existed. So, where one without notice conveys to one with notice, the purchaser with notice shall be protected; for otherwise, a *bona fide* purchaser might be deprived of the benefit of selling his property for its full value." And this rule is sustained by innumerable precedents.

And it occurs to me that it is founded in reason. If the second grantee, from the same vendor who buys, acquires the priority over the old unrecorded deed, why should not the vendee of the second grantee, who purchases without notice, be equally protected? If the laches of the first grantee, in not having this deed recorded in time, is made the reason for giving precedence to the second purchaser, without notice, does it not operate with equal force in favor of the innocent purchaser without notice, from the second grantee with notice. It is by the same laches that this second purchaser is enabled to perpetrate a fraud upon his innocent vendee.

It is said that he may resort to his warranty, and thus cause the loss to fall upon the right person. The same argument would apply as between the two original grantees from the same vendor. And yet the legislature has not deemed that a satisfactory reason; and hence passed the act of 1837. A warranty is not always given, and the warrantor may be irresponsible. Moreover, it is not disputed but that there is a class of cases where this principle does obtain. Why should it prevail in any case if the foregoing reply is satisfactory? Neither law

nor equity ever looks beyond an innocent purchaser, but spreads its broad ægis over him.

Again: it is contended that this doctrine is illogical. For, say counsel, if the first purchaser with notice takes nothing, how can he convey a title to a *bona fide* vendee? When A sells in fee to B, has he anything left? And yet it is yielded, for the statute so declares, that if B fails to record in time, A may subsequently sell the same land to C. The right, in both cases, depends upon the law, which may regulate the rights of the parties as to justice shall seem proper.

But I forbear to elaborate any further. Such being the settled rule in this state and out of it, prior to the passage of the act of 1837 (which, so far from discountenancing, rather favors the doctrine, by inference at least, for which we are contending), and of this court since the unanimous decision of this court in *Truluck v. Peebles*, 3 Ga. 446, in 1847; and the general assembly, with full knowledge of the old law, not having seen fit to disturb it, we think it best to adhere to the practice, however ingenious and plausible the arguments submitted to the contrary, until changed by statute to operate prospectively. To overrule all past adjudications, whether ill or well founded, whether with or without sufficient authority, and establish a contrary rule, would be to overthrow a vast number of land titles in this state. No court ought to do this.

Judgment reversed.

MCDONALD, J., concurred.

BENNING, J., filed a dissenting opinion.

BONA FIDE PURCHASER, WITHOUT NOTICE, FROM FRAUDULENT GRANTOR, will be protected in his purchase: See *Herndon v. Kimball*, 50 Am. Dec. 406; as to title acquired by a *bona fide* purchaser, see *Hall v. Delaplaine*, 63 Id. 57, and note 65.

MAYOR AND COUNCIL OF ROME v. OMBERG.

[28 GEORGIA, 43.]

MUNICIPAL CORPORATION IS NOT LIABLE FOR DAMAGES CAUSED IN GRADING STREET by digging so near plaintiff's lot that the earth supporting it crumbled away and his fence fell, if the corporation had authority to grade the street and did not act in excess of its authority.

CASE by the defendant in error against the plaintiff in error, for digging and cutting down a street adjoining his lot, whereby

his fence built along the line of the street was undermined and thrown down. After the close of the plaintiff's testimony the defendant moved to dismiss the action on the ground that the defendant, being a municipal corporation, was not liable in this form of action. This motion being overruled, the defendant excepted. The defendant then introduced evidence under its pleas of the general issue and the statute of limitations. Verdict and judgment were for the plaintiff, and the defendant assigned error upon the overruling of his motion and other grounds.

T. W. Alexander, for the plaintiff in error.

Underwood and Smith, contra.

By Court, LUMPKIN, J. The question involved in this case is one of great practical importance, and I confess my convictions are not so strong as I could wish them to be.

It is not denied that the mayor and council had authority to grade the streets of the city of Rome. There is no excess of authority charged. In the exercise of this acknowledged right, is the city which they represent to be assessed with damages for digging so near defendant's lot that the earth which supported afterwards crumbled away, and his fence fell?

It cannot, we think, with any propriety be contended that this is taking private property for public use. They were simply using their own property for the purpose for which it was appropriated, by reason of which this consequential damage resulted to the plaintiff.

This question has been mooted both in England and in this country, and there are strong precedents in both against the claim here set up: See *Ferguson v. Baber*, 24 Ga. 402, and the authority there cited.

In *Governor etc. of Cast Plate Manufacturers v. Meredith*, 4 T. R. 794, a case which in principle is like the one now under consideration, it was said by Lord Kenyon: "If this action could be maintained, every turnpike act, paving act, and navigation act would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to individuals who happen to suffer. But if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction. The interests of individuals must give way to the accommodation of the public." See also *Sut-*

ton v. Clarke, 6 Taunt. 29; *Hall v. Smith*, 2 Bing. 156; *Leader v. Moxon*, 3 Wils. 461; S. C., 2 W. Black. 924.

The same principle was elaborately argued and carefully considered in *Wilson v. Mayor etc. of New York*, 1 Denio, 595 [43 Am. Dec. 719], and the supreme court held, upon a review of all the cases, that the corporation of the city of New York was not liable to actions for injuries done to individuals in the exercise of its authority to direct the ditching, paving, and grading of the streets; and that when the corporation, in grading two public streets which formed an angle in which the plaintiff's premises were situated, raised those streets so as to prevent the water from flowing off, whereby damages ensued to the plaintiff, who brought case against the corporation, that the action could not be sustained: See *Ex parte Manhattan Co.*, 22 Wend. 653; Gale & Whatley on Easements, 156, note 17, and page 181; *King v. Commissioners*, 8 Barn. & Cress. 355.

It being conceded that these proceedings are regular, that what has been done, it was lawful to do, the corporation not having transcended its authority, our conclusion is that although the plaintiff has been injured, it is *damnum absque injuria*. People purchase property and build in towns with full knowledge of public necessity to level streets by excavating or elevating as the case may demand; and they must take the chances and consequences. No part of the plaintiff's land has been touched.

Why should the corporation be required to furnish a prop from their street to keep up the plaintiff's inclosure? Has he the right to take the public highway for that purpose? Is it not more reasonable for him to furnish the stone wall than for the corporation to erect it? They do not need it. He does. He has used his property with an eye single to his interest and convenience; why should not the public be suffered to do the same with theirs? Why did he erect his fence so near the street as to make this support necessary? The public necessities compel the opening of streets of a certain width. But there is no such imperative necessity for the plaintiff's having his yard or garden a few feet wider. There is more of selfishness at the bottom of all these claims than appears at first blush.

Judgment reversed.

MUNICIPAL CORPORATION IS NOT LIABLE FOR CONSEQUENTIAL DAMAGES ACCRUING IN GRADING STREETS, such as the fall of fences and the like: Note to *Perry v. City of Worcester*, 66 Am. Dec. 437, 438. When a municipal corporation is fully vested by law with power over the streets of the city,

and it is guilty of no excess of authority, a private action cannot be maintained against it for consequential damages resulting from the grading of such streets or the construction of any other improvement necessary and proper for the benefit of the city in using the same: *Roll v. City Council of Augusta*, 34 Ga. 326; *Smith v. City Council of Alexandria*, 33 Gratt. 212; *Gillison v. City of Charleston*, 16 W. Va. 290, citing the principal case. An adjacent property owner is not entitled to an injunction upon the ground that the sewer which, in the discretion of the municipal authorities, is about to be inserted may be too small for the volume of water which, at the time, will necessarily pass through it, thus flooding his lot, causing sickness, and otherwise damaging him: *Mayor v. Aldridge*, 64 Ga. 527.

EVANS v. SMITH.

[28 GEORGIA, 98.]

INSTRUMENT IN FORM, SUBSTANTIALLY, "I, A, OUT OF MY LOVE FOR MY SISTER B, do agree to make her my heir if she outlives me; and I, B, out of my love for my sister A, do agree to make her my heir if she outlives me," if properly attested and otherwise regular in form, is a will, and parol evidence to establish it as a will is admissible.

INSTRUMENT MAY BE WILL THOUGH IN FORM OF DEED if it is revocable at pleasure, not to take effect until the death of the maker, and properly attested and otherwise regular in form.

PAROL EVIDENCE CONSISTENT WITH WRITING TO WHICH IT RELATES IS ADMISSIBLE.

CAVEAT to a will propounded for probate by Martha (Patsey) T. Smith as the will of Jane (Jincey) E. Smith, and in the following words: "Georgia, Baldwin county. Know all persons by these presents, that we, Jane E. Smith of the one part, and Patsey T. Smith of the other part, both of the state and county aforesaid, have this day covenanted and agreed, and by these presents do each of us covenant and agree, with each other, that for and in consideration of the love and affection we have for each other, that we agree and covenant and bind ourselves to each other that whichever of us it may please the hand of Providence to remove first by death, the other shall be sole heir to all the estate which the deceased shall or may own at the time of her death, both real, personal, and perishable; that is to say, that should the said Jane E. Smith die and leave the said Patsey T. Smith living, the said Patsey is to be sole heir to all the estate the said Jane E. may or shall own at the time of her death; or that should the said Patsey T. die first and leave the said Jane E. living, then the said Jane E. is to be sole heir to all the estate the said Patsey T. may or shall own at the time of her death; and we further covenant and agree that it shall be the privilege of the one that may or shall be the longest lived to make whatever dis-

posals of all the property, both real, personal, and perishable, that may in her judgment be most suitable. Given under our hands this the twenty-fifth of March, 1856, and in witness whereof we have this day written our names and seals in presence of [signed] R. L. G. Bozeman, T. C. Mathews, Joseph B. Williams. [Signed] Jincey E. Smith [L. s.], Patsey T. Smith [L. s.]." B. T. Evans, the husband of another sister of Jane E. Smith, filed a caveat to the probate of this paper, on the ground that Jane E. Smith did not intend it to operate as a will, that it was executed under undue influence, that she was not of sound and disposing mind and memory, that such instruments are contrary to public policy and void, and that the paper was not a will, but a covenant or agreement, which required the assent of both parties to alter or revoke. Upon the trial, R. L. G. Bozeman testified to the circumstances of the execution of the paper, and the intention of the parties thereto, and his testimony tended strongly to show that they intended the paper to be a will, that neither was under undue influence, that the deceased was a woman of determination and force of character, and that as to her the paper was duly attested by three witnesses, who, at her request, in her presence and in the presence of each other, signed as witnesses the paper which she then and there declared to be her last will and testament. Bozeman testified that Jincey and Patsey, who were his aunts, and who were thus called in the family, were twin maiden sisters, and had lived much of their life together; that they each declared their intention to leave their property to the other, and requested him to draw their will. He told them that he knew nothing about wills, but had drawn up deeds. But they still insisted in his drawing their wills, and because he had but one sheet of paper he wrote their wills together upon the same sheet. Bozeman and other witnesses testified to the deceased's often expressed intention to will all her property to her sister Patsey, and to her sound and disposing mind and memory. Counsel for the caveator objected to all of this testimony so far as it was intended to affect the language or terms of the instrument or to give it the effect and operation of a will. The paper was then read in evidence, contrary to the caveator's objection. Verdict for the propounder, and assignment of error by the caveator.

Overby and Bleckley, and Tidwell and Wooten, for the plaintiff in error.

Huie and Connor, and B. H. Hill, contra.

By Court, BANNING, J. The exceptions are two: one to the admission of the verbal evidence as to intention, the other to the admission of the paper as a will.

The object of this verbal evidence was to show that the paper was a will; and whether the evidence was admissible or not depended on whether showing that would have been to contradict the paper. If showing that would have been consistent with the terms of the paper, then to show that would not have been a violation of any rule of which we are aware. There is no rule that excludes parol evidence consistent with the writing to which it relates.

The question, then, is this: Was the paper such that it might, on its face, be read as a will—as the will of Jincey Smith? And we think it was.

The words will bear that construction. If we take the mere words, we may say that the instrument was a double will—the will of each sister. The words will well bear the following meaning, viz.: “I, Jincey, out of my love for Patsey, do agree to make her my heir if she outlives me; and I, Patsey, out of my love for my sister Jincey, do agree to make her my heir if she outlives me.” The consideration of each sister is her love for the other; not this agreement of the other. The making of the instrument by the one sister is not the consideration for the making of it by the other. No; the making of it by the one is an act entirely independent of the making of it by the other. The case is, in substance, precisely the same as it would have been if each sister had executed a separate paper, and had said in that paper just what makes her part in the joint paper. The mere words “I say” authorize this conclusion. Suppose, then, that each sister had executed a separate instrument, and in it had expressed the same ideas which she expressed in the joint instrument, would these instruments not be wills? What would there be to prevent them from being wills, assuming, of course, that they were properly attested, and were otherwise regular as to form? Nothing, as far as we can see. They would be instruments merely in consideration of love; therefore they would be revocable at pleasure. They would be instruments not to take effect until the death of their respective makers; therefore they would not be deeds, for deeds take effect at their execution. Then they would be wills, or they would be nothing. It is true that they would be, in form, covenants to convey, and not actual conveyances. But a will may take the form of most, if not of all, other instruments. It may take

the form of a covenant. In *Corp v. Corp*, the instrument was in these words: "By this deed I bind myself to give to my wife, either upon the demise of her mother, or the sale of the Yorkshire estate. . . . I do, therefore, hereby ordain that my executors, administrators, and assigns consider this deed as the most solemn obligation, in confirmation of which I set my hand and seal." This instrument, though in form only a bond or covenant, was held to operate as a will: Note to *Thorald v. Thorald*, 1 Phillim. 11. Indeed, mere precatory words often amount to a will.

Two cases were read to show that this was an instrument "unknown to the testamentary law." The first was the case of *Hobson v. Blackburn*, 1 Add. Ec. 274. But in that case the execution of the paper by each one of the parties to it was clearly the consideration for the execution of it by the other; and that distinguishes the case from this.

The other case was *Clayton v. Liverman*, 2 Dev. & B. 558, and it seems to be distinguishable in the same way from this.

If, then, we confine ourselves to the mere words of this instrument, we must conclude that it is a will.

It follows, therefore, that verbal evidence going to show that it was a will was entirely consistent with it, and was therefore admissible.

And that evidence once in, the case became clear beyond a doubt that the paper was a will. The evidence of Bozeman on the point is so full, so minute, so simple, and every way so likely, that it is irresistible.

We think, then, that the court was right, both in admitting the verbal evidence and in holding that the instrument was a will.

Judgment affirmed.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN WRITING: *Pribble v. Kent*, 71 Am. Dec. 327; *Bowen v. Slaughter*, Id. 135.

INSTRUMENT IN FORM OF DEED MAY BE WILL if it is in other respects a will: *Babb v. Harrison*, 70 Am. Dec. 203, and note.

JOINT WILLS.—This subject is treated in the note to *Lewis v. Scofield*, 69 Am. Dec. 407-410. In *Walker v. Walker*, 14 Ohio St. 165, it was held that a joint will is unknown to the testamentary law of Ohio; and where a husband and wife, each being the separate owner of property, join in the execution of an instrument in the form of a will, and treating the separate property of each as a joint fund, and bequeathed legacies and devised lands, it cannot be admitted to probate as the joint will of both parties, nor as the separate will of either, distinguishing the principal case on the ground that there the will though joint in form was virtually the separate will of each testatrix. In *Betts v. Harper*, 39 Ohio St. 641, it is held that tenants in common of real estate,

who are also owners severally of personal property, may dispose of the same by will by uniting in a single instrument, where the bequests are severable and the instrument is not in the nature of a compact, but is, in effect, the will of each, revocable by him and subject to probate as a several will; and where the instrument is not offered for probate until the death of all executing it, it may then be probated as the will of each and all such persons; and the principal case was cited and *Walker v. Walker*, *supra*, limited.

LOGAN v. SUMTER.

[28 GEORGIA, 242.]

UPON QUESTION OF RIGHT OF ASSIGNEE OF EXECUTION TO RECOVER THEREON against the defendant therein, it is proper to inquire into the right of the execution plaintiff to recover thereon, since the assignee stands in his place, and has no better right.

IN ACTION BY EXECUTION DEFENDANT AGAINST ASSIGNEE OF EXECUTION TO RECOVER MONEY PAID THEREON, the exemplification of the judgment and the execution against the defendant, and the exemplification of a judgment and an execution against another defendant for the same debt, which show that the execution plaintiff, through whose personal representatives the assignee claimed title, had received payment for the debt, are admissible in evidence, notwithstanding the objection that the judgments and executions are not between the parties to the suit.

ONE MAY RECOVER MONEY PAID, UNDER BELIEF OF LIABILITY, UPON EXECUTION upon which he was not liable

ACTION by J. M. Sumter against Logan to recover money paid on an execution against J. M. Sumter as first indorser of a note made by T. W. A. Sumter. The opinion states the case.

D. R. Mitchell, for the plaintiff in error.

Underwood and Smith, contra.

By Court, McDONALD, J. The action of the court below was brought to recover money which, it was alleged, was paid without consideration. The plaintiff in error became possessed of an execution, issued on a judgment obtained in Habersham superior court, in favor of B. F. Patton against the defendant in error, on the indorsement of a note of one thousand dollars, made by T. W. A. Sumter, and indorsed by several persons, and among them Jacob Stroup, who was the last indorser. The maker and indorsers were all sued in separate actions by Patton, the holder; and Jacob Stroup, the last indorser, paid the entire debt, all which appears in an exemplification of the case, and an execution against Stroup. B. F. Patton died, and his administrators, finding amongst his papers the execution, open

and unsatisfied, against Sumter, the defendant in error, sold it as an insolvent or doubtful debt. Through that sale the plaintiff in error became the holder of it, and under it received the money sought to be recovered back. Whether he is the holder under an administrator's sale, or by transfer of the plaintiff himself, he is the assignee of it, and is authorized to collect it in as full and ample a manner as the plaintiff could have done if there had been no transfer or assignment of it: Cobb's New Dig. 699. He stands in his place, and can have no better or higher claim. It is always legitimate, then, in controversies arising between the assignee of an execution and the defendant, to inquire into the right of the plaintiff against the defendant; and whether, if it had not been transferred, the plaintiff could have collected it.

On the trial of the cause in the court below, the defendant in error, who was plaintiff in that court, offered in evidence the copy of records, from the superior court of Habersham county, of the judgments in favor of B. F. Patton against Jacob Stroup, and against the defendant in error, and the executions and entries thereon, issued on said judgments, to the admission of which the plaintiff in error, by his counsel, objected, on the ground that they were "irrelevant and improper," not being between the parties litigant in the cause. The execution and the exemplification of the judgment on which it was founded, against the defendant in error, was admissible, for it was the subject of the contract on which the money was paid by the defendant to the plaintiff in error. The other record and execution were admissible as showing the rights of the plaintiff in *ß. fa.* against the defendant in error at the time of the transaction between the plaintiff and defendant in error. Again: the plaintiff in error claimed through B. F. Patton, the plaintiff in *ß. fa.*, and stood precisely in his place, and "the declarations of an intestate are admissible against his administrator, or any other claiming in his right:" 1 Greenl. Ev., sec. 189. This does not differ from the ordinary case of a claim, where the claimant is allowed to prove the payment of an assigned execution, while it was in the hands of the original plaintiff by any evidence which would be admissible if that plaintiff had not transferred it.

After the evidence was closed, the plaintiff in error moved in the court below for a nonsuit, on the ground that the evidence of the plaintiff did not make out a case of legal liability by the defendant to the plaintiff. The court overruled the mo-

tion, and this decision is assigned as error. It was contended before us that in the original transaction between the plaintiff and defendant in error there was a sufficient consideration to support the contract, and that if there was, the plaintiff in the court below ought not to recover. This argument seems have been sustained on the assumption that the main ground on which the plaintiff relied for a recovery was, that the execution was at the time dormant, and could not be enforced against him. If that had been the only ground of objection to the execution, the consideration, unquestionably, would have been sufficient, for it might have been revived against him.

But the plaintiff in error had no title. He derived the execution from a party who had been paid, and who, had he been the plaintiff in a proceeding to revive the judgment, must have been defeated. The plaintiff in error could occupy no better position; and if, in a proceeding of that sort, he must have been defeated, either because he had no title, or because the execution had been paid, the defendant in error was not liable to him in any respect, and all that he paid for a discharge from the execution, believing that he was liable on it, was a payment without consideration, and he is entitled to recover it back.

Judgment affirmed.

MONEY PAID BY MISTAKE, RECOVERY OF, UNDER COUNT FOR MONEY HAD AND RECEIVED: Note to *Wells v. Brigham*, 52 Am. Dec. 759, 760.

JOHNSON v. REESE.

[28 GEORGIA, 353.]

OMISSION BY SHERIFF TO ADVERTISE SALE AT THREE PUBLIC PLACES IN COUNTY does not render the sale void, where the statute provides merely that it is "the duty" of the sheriff to so advertise; but the sheriff may be liable for any loss occasioned by such omission to any one interested.

BILL for vacation of sheriff's sale, and for an injunction filed against Reese, sheriff, and others. Land of the complainant was levied upon and sold by the sheriff, who advertised the sale in a newspaper, but failed to advertise it at any public place within the county. On the day of the sale the complainant protested against the sale, on the ground that it had not been legally advertised, but the sheriff proceeded with the sale, and sold to Brinkley, the highest bidder, for an alleged inadequate price, and Brinkley soon afterwards sold the land

to another. The bill prayed that the sheriff's sale be set aside; that the sheriff's deed to Brinkley and the deed executed by Brinkley be canceled; and that the sheriff be enjoined from putting the purchaser or his assigns into possession. Injunction issued, which, after answer filed, was dissolved upon defendant's motion. Complainant excepted.

E. H. Pottle, for the plaintiff in error.

Warden and Nelms, and A. H. Stephens, contra.

By Court, BENNING, J. Was the court below right in sustaining the motion to dissolve the injunction? One of the grounds of the motion was that there was no equity in the bill. If that ground was good, the answer must of course be in the affirmative.

Is it true, then, that there was no equity in the bill?

Both the first and the second purchaser bought with notice of the sheriff's omission to advertise the sale of the land "in three of the most public places in the county;" but there was no collusion between them, or either of them, and the sheriff. The question therefore is, Did this omission in the sheriff and their notice of the omission render the sheriff's sale void?

If, notwithstanding the omission, the sheriff had still authority to sell, the sale was not void, but was valid. Did the sheriff, then, have authority to sell? It is conceded that he had, unless the thirty-third section of the judiciary act of 1799 deprived him of the authority. That section is as follows: "No sales in future shall be made by the sheriff of property taken under execution but on the first Tuesday in each month, and between the hours of ten and three in the day; and it shall be the duty of the sheriff to give thirty days' notice in one of the public gazettes of the state of all sales of lands and other property executed by him, and also advertise the same in three of the most public places in the county where such sales are to be made, and shall give a full and complete description of the property to be sold, making known the name of the defendant and the person who may be in possession of the property, except horses, hogs, and cattle, which may be sold at any time by the consent of the defendant; and in which case it shall be his duty to give the plaintiff ten days' notice thereof, and also to advertise the same in three or more of the most public places in the county where such property may be, at least ten days before the sale:" Cobb's Dig. 509. This section says, then, that it shall be "the duty" of the sheriff to advertise his sales

in three of the most public places in the county. But is that saying that if he fails so to advertise his authority to sell shall cease, and any sale made by him shall be void? We think not. The first part of the section says: "No sales . . . shall be made . . . but on the first Tuesday in each month, and between the hours of ten and three." This is stronger. This amounts to saying that the sheriff shall not have authority to sell at any other time. After this, when it comes to speaking of the advertisement, the form of expression changes and becomes weaker. It shall be the duty of the sheriff to advertise his sales, etc., not that no sale shall be made unless he does so advertise them. Such is the form the expression then assumes.

Some effect, ought, we think, to be given to this charge, in the form of the expression. And the least effect to be given to it seems to be to say that the intention was that the sale should be valid, notwithstanding the omission to advertise it, but that the sheriff should be liable to make good any loss happening to any one interested, occasioned by the omission to advertise. And giving this effect to it would be doing what would be best for both the plaintiff and the defendant in the *fi. fa.*; for it would operate to encourage persons to become bidders for the property, and to encourage bidders to run the property to its value.

We think, then, that the only effect of the sheriff's omission to advertise this land in three of the most public places of the county was to render himself liable to whomsoever the omission injured to make good the injury. We think that the effect did not go further, and render the sale void. Consequently, we think that there was no equity in the bill, and therefore that the judgment dissolving the injunction was right. Taking this view of the case, it becomes unnecessary to notice several other questions which were argued.

If there had been a fraudulent collusion between the purchaser and the sheriff, the case might have been different.

Judgment affirmed.

STATUTORY PROVISIONS CONCERNING NOTICE OF SALE ARE DIRECTORY, and a failure to comply therewith does not render the sale void, and the remedy for a failure of compliance is against the officer: *Smith v. Randall*, 65 Am. Dec. 475, and cases cited in the note 480; *Hobbs v. Murphy*, 64 Id. 194, note 195. In *Johnson v. Reese*, 31 Ga. 603, it was held that the sheriff is liable personally for the damages accruing from his failure to advertise the sale in three public places, as provided by the statute, and that this point was not decided in the principal case.

ALLEN v. STATE.

[28 GEORGIA, 295.]

RULE CONCERNING LEADING QUESTIONS IS AS STRINGENT RESPECTING WITNESSES CALLED TO IMPEACH WITNESSES as it is respecting other witnesses.

INSTRUCTION THAT DEFENDANT WAS JUSTIFIED IN SHOOTING AT PROSECUTOR, after prosecutor had attempted to shoot him, is properly refused, since it assumes that the prosecutor had attempted to shoot him, and because this fact alone is not a justification of the shooting, since the prosecutor may have abandoned the combat after attempting to shoot.

TO CONSTITUTE JUSTIFICATION FOR SHOOTING AT ANOTHER, something more must appear than the single fact that the defendant did not shoot until an attempt had been first made to shoot him.

WHETHER OR NOT GUN IS LOADED, AND HOW LOADED, IS VERY MATERIAL on the question of intent, upon an indictment under a statute against shooting at another.

INDICTMENT for assault with intent to murder, and "for shooting at another," contrary to the statute in such cases made and provided. The jury found the defendant guilty upon the latter count. The defendant moved for a new trial, upon three grounds: 1. Because the court erred in allowing the attorney-general, after asking a witness for the defendant whether or not he had made certain statements concerning the case to one Ponder at two places and times designated, to introduce Ponder for the purpose of impeaching such witness, and to read to Ponder from a paper in his hands the statements denied by the witness, and to ask Ponder whether or not the witness, at the designated times and places, had made such statements to him. After counsel for the defendant had objected to this method of interrogation as leading and illegal, and insisted that the attorney-general should ask Ponder whether or not the witness, at the designated times and places, had made any, and what, statements to him relative to the case, or should propound questions of a like effect. 2. Because the court erred in refusing to give the defendant's requested instruction, "that if the constable was acting *de facto* or *de jure*, the defendant was justified in shooting, after the attempt of that constable to discharge a rifle at defendant, by snapping it three or four times before resistance by defendant." 3. Because the court erred in instructing that under the second count in the indictment for "shooting at" the prosecutor, it is immaterial upon the question of the defendant's guilt whether the pistol discharged by him was loaded with ball or shot, or not. The motion for a new trial was denied, and the defendant excepted, and assigns as error the decision upon the motion.

Jenkins, John K. Jackson, and A. H. H. Dawson, for the plaintiff in error.

McLaws, attorney-general, contra.

By Court, STEPHENS, J. The questions put to the impeaching witness in this case were excessively leading, and we think, for that reason, were irregular and improper. There can be no good reason for relaxing in favor of an impeaching witness the general rule against the asking of leading questions. This is a case where it devolves upon the jury to weigh testimony in a peculiar sense, and it is, therefore, important that the witness should first be left to exhaust his memory on the subject, without the aid of leading, in order that the jury may see how far he speaks from his own memory, and how far from suggestion. This is an important test in weighing the value of testimony.

The charge requested by defendant, that he was justified in shooting at the prosecutor after the prosecutor had attempted to shoot him, is wrong in two respects. It assumes that the prosecutor had attempted to shoot him—a fact which was contested in the case, and should have been submitted to the jury. But it also states the law erroneously. It does not follow that the defendant was justified merely because he shot after the prosecutor had attempted to shoot him. The prosecutor might have abandoned the combat, and then the defendant clearly would not have been justified in shooting. To constitute a justification, something more must appear than the single fact that the defendant did not shoot until an attempt had been first made to shoot him.

We think it is a most material matter whether the gun is loaded or not, and how loaded, under an indictment for shooting at another, contrary to the act of 1856. To shoot at implies an aim, and intent to hit, and therefore the nature of the load is important in judging of this intent. If the character of the load at a distance, as, for instance, a mere powder-gun at twenty yards distance, renders it impossible that the load could take effect, a reasonable man could not be presumed to intend that consequence. So the nature of the load is an important matter in enabling the jury to judge whether the defendant merely shoots or shoots at—whether he has or has not an intent to hit. This, we are satisfied, is the sound construction of this act. And for myself, I do not hesitate to say that the act is one which ought to be most strictly construed against the prosecution, and most liberally in favor of the accused.

So far from its being a salutary law, as pronounced by the court below, I regard it as a very hard law, and as involving absurd consequences. The only justification it allows is self-defense, which properly cannot include more than defense of life and person. Now, there are many cases under our law where a man may kill another not in self-defense, as in defense of habitation, and in some cases in defense of property. In these cases, he kills, and is justified; but if he shoots and misses, he incurs the penalty of this act, according to its strict terms. The penalty falls not on him who shoots and kills, but on him who shoots and misses. Its penalty, therefore, seems to be leveled at bad shooting, and yet no such thing can be presumed to have entered into the intention of the legislature. This is enough to show that the act is one which calls loudly for the enforcement of that rule which, in penal laws, construes strictly against the prosecution, and liberally in favor of the accused.

Judgment reversed.

PRACTICE UPON IMPEACHING WITNESSES.—The grounds for impeaching witnesses are stated in the note to *Blue v. Kibby*, 15 Am. Dec. 96-100. The subject of the impeachment of a witness by the party calling him is treated in the note to *Burkhalter v. Edwards*, 60 Id. 749-752, and also in the notes to *Blue v. Kibby*, *supra*, and *State v. Norris*, 1 Id. 574. And upon the impeachment of witnesses in bastardy proceedings, see the note to *Weatherford v. Weatherford*, 56 Id. 219. One of the most important phases of the subject of the impeachment of witnesses is the practice to be pursued by an attorney when he finds it advisable in the course of a trial to attack the credibility of a witness.

PRIOR CONTRADICTORY STATEMENTS.—*Laying Foundation for Introducing Evidence of Prior Contradictory Statements by Directing Mind of Witness to Time, Place, Person, and Circumstances Involved in Supposed Contradiction.*—An attorney who desires to impeach a witness of the opposite party, by proving that he has made statements concerning material matters inconsistent with or contradictory to his testimony on the trial, must first lay the proper foundation before he can legally introduce evidence of the supposed contradictory declarations. While he is cross-examining the witness to be impeached, he must ask him whether or not he has said or done what is intended to be proved for the purpose of impeaching him. It is necessary to do this in order that the witness may have an opportunity to explain the inconsistency. It is a serious thing thus publicly to assail the integrity and truthfulness of a witness, and to expose him possibly to a prosecution for perjury. It is furthermore manifestly in the interests of truth that the witness should be allowed to explain away a merely apparent inconsistency. Therefore the witness to be impeached must first be interrogated concerning the contradictory statements or acts before evidence of them is introduced: *Queen's Case*, 2 Brod. & Bing. 299; *Regina v. St. George*, 9 Car. & P. 483, 489; *Carpenter v. Wall*, 11 Ad. & El. 803; *McKinney v. Neil*, 1 McLean, 540, 547; *Weaver v. Traylor*, 5 Ala. 564; *Powell v. State*, 19 Id. 577; *Atwell v. State*, 33 Id. 61; *Beebe v. De Baum*, 8 Ark. 510; *Drennen v. Lindsey*, 15 Id. 309;

Rice v. Cunningham, 29 Cal. 492; *Sutton v. Reagan*, 5 Blackf. 217; S. C., 33 Am. Dec. 466; *McIntire v. Young*, 6 Blackf. 496; S. C., 39 Am. Dec. 443; *Weinsorpfen v. State*, 7 Blackf. 186; *State v. Angelo*, 32 La. Ann. 407; *Able v. Shields*, 7 Mo. 120; *State v. Davis*, 29 Id. 391; *Lee v. Chadsey*, 3 Keyes, 225; *Patchin v. Astor Ins. Co.*, 13 N. Y. 268; *Iverson v. Carpenter*, 17 Wend. 419; *State v. Wright*, 75 N. O. 439; *Davis v. Franke*, 33 Gratt. 413; *Langhorne v. Commonwealth*, 76 Va. 1012. In directing the attention of the witness to the prior acts or declarations, it is necessary to inform him not only what the statement or act was, but when, where, and under what circumstances it was made or done, and to whom, and in the presence of whom. The very occasion must be presented to the mind and attention of the witness as well as it can be within the limits of reasonable endeavor. It will not suffice merely to inquire of him whether he has ever made a specified statement. The most truthful man might answer "No" to such a question, whereas had his memory been assisted with a statement of the time, place, circumstances, and persons present, he would have remembered the occasion, and perhaps have explained the apparent inconsistency. And it is equally important that in the question asked the witness the precise matter supposed to be contradictory should be presented to him. That the foundation for introducing contradictory statements may be properly laid, counsel must, on cross-examination, ask the witness whether at a certain time, at a certain place, under certain circumstances, mentioning such as would be likely to direct the mind of the witness to the occasion, and to and in the presence of certain persons, he made such statements. If the question is reasonably specific in these particulars, so as probably to direct the mind of the witness to the occasion, and the witness denies directly or qualifiedly the making of the statements, the foundation is properly laid, and the evidence of the contradictory statements may be introduced at the proper time, which is when the cross-examining attorney has the case, and the privilege of introducing evidence: *Queen's Case*, 2 Brod. & Bing. 313, 314; *Angus v. Smith*, 1 Moo. & M. 473; *Crowley v. Page*, 7 Car. & P. 789; *Pain v. Beeston*, 1 Moo. & R. 20; *Conrad v. Griffey*, 16 How. 38; *McKinney v. Neil*, 1 McLean, 540; *Lewis v. Post*, 1 Ala. 65; *State v. Marler*, 2 Id. 43; S. C., 36 Am. Dec. 398; *Howell v. Reynolds*, 12 Id. 128; *Carlisle v. Hunley*, 15 Id. 623; *Armstrong v. Huffstutler*, 19 Id. 51; *Powell v. State*, Id. 577; *Nelson v. Iverson*, 24 Ala. 9; S. C., 60 Am. Dec. 442; *Hughes v. Wilkinson*, 35 Id. 453; *Bradford v. Barclay*, 39 Id. 33; *Haley v. State*, 63 Id. 83; *Washington v. State*, Id. 189; *Dabney v. Mitchell*, 66 Id. 495; *Henderson v. State*, 70 Id. 29; *Griffith v. State*, 37 Ark. 324; *Baker v. Joseph*, 16 Cal. 173; *People v. Devine*, 44 Id. 452; *People v. Bush*, 2 West Coast Rep. 575 (Cal.); *State v. Sealy*, 1 Ga. 213; S. C., 44 Am. Dec. 641; *Wright v. Hicks*, 15 Ga. 160; S. C., 60 Am. Dec. 687; *Matthis v. State*, 33 Ga. 24; *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558; S. C., 63 Am. Dec. 323; *Root v. Wood*, 34 Ill. 283, *Winslow v. Newlan*, 45 Id. 145; *Bock v. Weigant*, 5 Ill. App. 643; *Hill v. Gust*, 55 Ind. 45; *Meyncke v. State*, 68 Id. 401; *Lawler v. McPheeters*, 73 Id. 577; *State v. Collins*, 32 Iowa, 36; *State v. Kinley*, 43 Id. 294; *State v. McLaughlin*, 44 Id. 82; *Kelsey v. Layne*, 28 Kan. 218; *State v. Johnson*, 35 La. Ann. 871; *Whiteford v. Burekmyer*, 1 Gill, 127; S. C., 39 Am. Dec. 640; *Franklin Bank v. Pennsylvania etc. Co.*, 11 Gill & J. 28; S. C., 33 Am. Dec. 687; *Smith v. People*, 2 Mich. 415; *State v. Hoyt*, 13 Minn. 132; *Spaunhorst v. Link*, 46 Mo. 197; *Palmer v. Haight*, 2 Barb. 210; *Pendleton v. Empire etc. Co.*, 19 N. Y. 13; *Sloan v. Railroad*, 45 Id. 125; *Gaffney v. People*, 50 Id. 423; *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *Gilbert v. Sage*, 5 Lans. 289; *Iverson v. Carpenter*, 17 Wend. 419; *State v. Patterson*, 2 Ired. L. 346;

S. C., 38 Am. Dec. 689; *King v. Wickz*, 20 Ohio, 87; *State v. McDonald*, 8 Or. 113; *Sheppard v. Yocum*, 10 Id. 402; *Moore v. Bellis*, 11 Humph. 67; S. C., 53 Am. Dec. 771; *Treadway v. State*, 1 Tex. App. 668; *Downer v. Dana*, 19 Vt. 338; *State v. Glynn*, 51 Id. 577; *Dufrenoy v. Weiss*, 46 Wm. 290; *Ketchingman v. State*, 6 Id. 426, 431. Where the proper foundation cannot be laid because the witness sought to be discredited is dead, proof of the contradictory statement will not be admitted: *State v. Johnson*, 35 La. Ann. 871; see also "Depositions," etc., *infra*. It is not sufficient to direct the attention of the witness merely to dates, names, and other attendant circumstances; he must also be asked whether or not he has said or declared what is intended to be proved: *Higgins v. Carlton*, 28 Md. 115; *Baker v. Joseph*, 16 Cal. 173.

Different Practice Prevails in Few States.—In Maine, Massachusetts, and New Hampshire it is not necessary to lay any foundation for the introduction of evidence of prior contradictory statements, and the witness need not be interrogated at all concerning them: *Ware v. Ware*, 8 Greenl. 42; *Wilkins v. Babbershall*, 32 Ma. 184; *New Portland v. Kingfield*, 55 Id. 172; *Tucker v. Welch*, 17 Mass. 160; S. C., 9 Am. Dec. 137; *Gould v. Norfolk Lead Co.*, 9 Oush. 338; S. C., 57 Am. Dec. 50; *Commonwealth v. Hawkins*, 3 Gray, 463; *Day v. Stickney*, 14 Allen, 260; *Ryerson v. Abington*, 102 Mass. 531; *Blake v. Stoddard*, 107 Id. 112; *Titus v. Ash*, 24 N. H. 319; *Cook v. Brown*, 34 Id. 460; *Nute v. Nute*, 41 Id. 60, 69; see *Howland v. Conway*, 1 Abb. Adm. 281. If the witness has explanations to make, he may do so on re-examination, or may be recalled for that purpose: *State v. Winkley*, 14 N. H. 480; *Titus v. Ash*, 24 Id. 319; *State v. Reed*, 62 Ma. 129.

In Connecticut and Pennsylvania, it is a matter within the sound discretion of the trial court whether the witness must first be asked whether he made the supposed contradictory statements: *Hedge v. Clapp*, 22 Conn. 262; S. C., 68 Am. Dec. 424; *Tomlinson v. Town of Derby*, 45 Conn. 565; *Sharp v. Emmet*, 5 Whart. 288; S. C., 34 Am. Dec. 554; *McKee v. Jones*, 6 Pa. St. 429; *Sterns v. Merchants' Bank*, 53 Id. 498; *Kay v. Fredrigal*, 3 Id. 221; *Walden v. Finch*, 70 Id. 460; *contra: Wright v. Cusmy*, 41 Id. 102; *McAteer v. McMullen*, 2 Id. 32. When the witnesses are all present, and the contradiction tends seriously to impair the credibility of the witness or affect his character, he should have an opportunity of explanation or denial: *Walden v. Finch*, 70 Pa. St. 460.

Reasonable Certainty only is Necessary as to Time, Place, etc.—It is not sufficient in laying the foundation for the introduction of prior contradictory statements to give only the name of the person to whom the statements were made, but the circumstances likely to recall the occasion to the witness must also be mentioned: *Pendleton v. Empire etc. Co.*, 19 N. Y. 13. The place where the contradictory statements were made must not be omitted from the question: *Hill v. Gust*, 55 Ind. 45. But reasonable certainty in describing the time and place of the making of the statements is sufficient: *Pendleton v. Empire etc. Co.*, 19 N. Y. 13. The rule "is satisfied when the attention of the witness is called with reasonable certainty to the subject of the previous declarations. The precise words need not be repeated, and in many cases the precise time could not well be stated, and yet the witness might be as fully guarded against imposition as if the exact language and time had been given." *Nelson v. Iverson*, 24 Ala. 9; S. C., 60 Am. Dec. 442, 444. The exact hour or day need not be named. Reasonable certainty is sufficient. The object is to direct the mind of the witness to the particular statement, and if this is done, it is sufficient: *Kelsey v. Layne*, 28 Kan. 218; *Union Parish School Board v. Trimble*, 33 La. Ann. 1073; *State v. Hampton*,

Id. 1252; *State v. Hoyt*, 13 Minn. 132. The time need not be fixed with absolute precision. If the attention of the witness has been directed to dates and the attendant circumstances with a reasonable degree of certainty, so as to afford him an opportunity to refresh his recollection, it is sufficient. And where the place and persons in whose presence the declarations were made were specifically named, and the time was mentioned as about August, 1882, this was sufficiently certain: *Meyer v. Appel*, 13 Ill. App. 87. The time is sufficiently fixed when the attention of the witness is called to the particular conversation, and where the witness was asked whether at a certain place, in conversation with a certain person, in December, 1860, he did not make certain specified statements, and he answered in the negative, this was a sufficient foundation: *Bennett v. O'Byrne*, 23 Ind. 604. An impeaching question which calls for a statement made "in June last, in Hazelton, Indiana," is sufficiently definite as to time and place when the principal witness admits a conversation at such time and place, though denying the particular statement imputed to him: *Evansville etc. R. R. Co. v. Montgomery*, 85 Id. 494. A question which directed the attention of the witness to the "examining trial in this cause" sufficiently laid the predicate as to time and place: *Grosse v. State*, 11 Tex. App. 364. When the witness was asked whether he made a certain statement to a certain person in the spring of 1830, and he denied it, counsel was allowed to show that the witness made that statement to that person in February, 1830. This variance in time was immaterial, as the witness's mind was sufficiently directed to the time of making the statement: *Nelson v. Iverson*, 24 Ala. 9; S. C., 60 Am. Dec. 442. It was held that the time and place were not fixed with sufficient definiteness where the witness was asked whether, about the month of August, at Wabash, he had made certain statements to certain persons: *Joy v. State*, 14 Ind. 139. It is not necessary that the impeaching witness should be able to swear to the exact date. It is enough if it appear that he is about to speak in reference to the same declaration or conversation to which the attention of the principal witness has been called: *Lawler v. McPheeters*, 73 Id. 577.

Practice in Questioning Impeaching Witness as to Language Used.—Where a witness is called to contradict another witness, who has stated that certain expressions were used, the proper practice is to ask whether such expressions were used, without putting the question in a general form, by inquiring what was said: *Farmers' Mut. Fire Ins. Co. v. Bair*, 87 Pa. St. 124; *People v. Ah Yate*, 60 Cal. 95. But see the principal case. But where a witness in cross-examination denies having used particular expressions in the presence of the parties, the opposite counsel examining a person to contradict the witness is not at liberty to lead his witness by reading from his brief the words denied. For the conversation spoken of being in the presence of the parties, and evidence of itself, cannot be thus used, but the witness must be asked what passed on that occasion: *Hallett v. Cousens*, 2 Moo. & R. 238. The precise words used in making a prior contradictory statement need not be proved: *Gould v. Norfolk Lead Co.*, 9 Cush. 338; S. C., 57 Am. Dec. 50. If the substance of it is proved, it is sufficient: *Armstrong v. Huffstetler*, 19 Ala. 51. It is not necessary that the impeaching witness be able to state all that the other witness said; it is sufficient if he is able to prove the repugnancy as to the particular fact with regard to which it is alleged to exist: *Mileards v. Sullivan*, 8 Ired. L. 302.

If Witness Answers that He does not Remember having Made Statements, This Admits Proof of Them. If the witness admits making the contradictory statements imputed to him, of course no further proof of them is necessary,

45 Md. 290; *McKinney v. Neff*, 1 McLean, 540, 547; *Clapp v. Wilson*, 5 Denio, 285, 287. The authenticity of a deposition may be proved by showing it to the witness and obtaining his admission that the signature is his: *Clapp v. Wilson*, *supra*. In that case it is held that, respecting a sworn statement in writing, it is not necessary to call the attention of the witness in the first instance to the particular statements in it intended to be relied on for impeachment with a view to explanation. This is necessary only with respect to naked contradictory statements. But the document is not in evidence so as to permit it to be read as a matter of right on the argument until not only its authenticity is proved, but also it is read to the court and jury, and this must be done before the evidence closes unless the reading is waived by the opposite party. Still, even if not thus formally placed in evidence, if it has not been so read or its reading waived, it is within the discretion of the court to permit counsel to read it on the argument; and then if the adverse party is surprised, and makes out a case showing the necessity of the presence of his witness to explain the evidence thus unexpectedly introduced, the new evidence should not be admitted without giving time for recalling the witnesses. "The request of the defendant did not, however, reach the point in this respect. He asked to have the witness recalled if such new evidence, in the estimation of the referees, should affect their opinion of Carr's evidence. It was for the defendant to determine what influence such new evidence was likely to have upon the minds of the referees, and to request unconditionally to have the witness recalled if thought necessary, and not make it depend upon the influence which such evidence might in point of fact have upon the referees." *Clapp v. Wilson*, 5 Denio, 285, 287-289.

Sworn Statements Made before Committing Magistrates.—In some jurisdictions, it is established that a deposition taken before a committing magistrate is receivable as original evidence on the trial of the accused for the alleged crime, to discredit the witness who made it, without cross-examining him concerning it: *People v. Butler*, 21 N. W. Rep. 385 (Mich.), following *Lightfoot v. People*, 16 Mich. 507; *Wormeley v. Commonwealth*, 10 Gratt. 658 (deposition on coroner's inquest); see *People v. Rector*, 19 Wend. 509. While elsewhere the usual rule of laying the foundation by asking the witness whether he made such statements or not prevails: *Nelson v. State*, 2 Swan, 237; *People v. Devine*, 44 Cal. 452. The written evidence given at a preliminary examination and sworn to by the witness must first be read or shown to him before he is obliged to answer as to what he testified to on that occasion: *Bellinger v. People*, 8 Wend. 595, 598; *Gross v. State*, 11 Tex. App. 364; *Regina v. Taylor*, 8 Car. & P. 726. A deposition taken before a coroner's jury is admissible on the trial to contradict the witness after the proper foundation has been laid: *People v. Devine*, 44 Cal. 452. The sworn statement before the committing magistrate is not admissible until its authenticity is established: *Bellinger v. People*, 8 Wend. 595; see *Clapp v. Wilson*, 5 Denio, 285, 287. If the deposition itself is to be used for the purpose of contradicting the witness, it must be shown that he subscribed it or put his mark to it. But if the deposition was inadmissible because not signed or authenticated, it is competent to contradict the witness by oral proof of his conflicting statements in the examining court, if they were of a material nature: *Gross v. State*, 11 Tex. App. 364. It is not necessary to ask the witness if his deposition was read over to him in the examining court. The fact, however, that it was not read over to him might be elicited as a circumstance tending to account for discrepancies between it and his testimony at the trial.

trial of the case: *Id.* It is error to allow portions of a written statement as given by the witness to the prosecuting attorney and chief of police to be read in evidence, but the whole of it should be introduced: *People v. Sweeney*, 22 N. W. Rep. 50 (Mich.). A deceased witness whose testimony taken in the committing court is read in the superior court may be impeached by prior contradictory statements, provided the proper foundation was laid in the examining court; and if the written examination fails to show such foundation, although it was really made, the committing magistrate may amend it to show the fact: *Griffith v. State*, 37 Ark. 324. The judge may question the witness as to any discrepancy which appears between his deposition and his evidence on the trial: *Rex v. Edwards*, 8 Car. & P. 26.

Testimony at Other Trials.—Before introducing evidence of what the witness testified to on a former trial, he must be asked whether or not on that occasion he testified to the supposed contradictory statements: *Taylor v. Morgan*, 61 Ga. 46; *Ray v. Bell*, 24 Ill. 444; *Terry v. Shively*, 93 Ind. 413; *State v. Ostrander*, 18 Iowa, 435; *State v. Collins*, 32 Id. 36; *contra: United States v. White*, 5 Cranch C. C. 457. The minutes of a witness's evidence before the grand jury cannot be introduced on the trial for the purpose of impeaching him, without giving him an opportunity to deny their correctness or state what he did testify to, before the grand jury: *State v. Ostrander, supra*. If a witness in answer to a question as to what testimony he gave on a former trial neither directly admits nor denies the act or declaration spoken of, it is then competent to prove the statement: *Ray v. Bell, supra*. A witness cannot be impeached by showing that certain circumstances to which he has testified were omitted by him when testifying concerning the same matter on a former trial of the action unless at the former trial his attention was particularly called to the circumstances which he then omitted to state: *Huebner v. Roosevelt*, 7 Daly, 111; *McAteer v. McMullen*, 2 Pa. St. 32. Contradictory statements cannot be introduced to impeach the testimony of a witness taken at a former trial, who has since died, unless he has been questioned as to such statements: *Runyan v. Price*, 15 Ohio St. 1. Notes of testimony of witness taken by a judge on a trial before him cannot be read to discredit the witness on a second trial, when the judge is unable to testify to their correctness: *Huff v. Bennett*, 6 N. Y. 337. In *State v. Collins*, 32 Iowa, 36, it is said that after the proper foundation is laid, the minutes of the testimony made by the magistrate are admissible. But in *Webster v. Calden*, 55 Me. 165, it is held that the report of evidence, though signed by the judge, is not admissible to prove what a witness testified on a former trial, for the purpose of contradicting him. Evidence stated in a case made on a former trial cannot be admitted to impeach a witness, since the case stated is not evidence upon oath: *Neilson v. Insurance Co.*, 1 Johns. 301. A bill of exceptions purporting to contain evidence of a witness given on a former trial, the witness not being a party thereto, cannot be read in evidence to impeach him, upon his denial that he testified as the bill shows: *Terry v. Shively*, 93 Ind. 413; *Boyd v. First Nat. Bank*, 25 Iowa, 255; *contra: Baylor v. Smithers*, 1 T. B. Mon. 6. While a brief of the evidence agreed upon at a former trial is admissible to attack the testimony of witnesses who swore at both trials, the proper foundation should be laid by asking the witnesses if they did not swear to certain facts on the former trial, and then if they deny that they so swore, that portion of the brief should be offered and specified which attacks them: *Taylor v. Morgan*, 61 Ga. 46. Whether a reporter's transcript of his notes of testimony in another case is admissible to impeach a witness, *quære: Case v. Burrows*, 54 Iowa, 679. A transcript of reporter's notes at a former trial is not

admissible for purposes of impeachment when the transcript is made by another than the reporter, and has not been compared with the original: *People v. McKinney*, 49 Mich. 234.

Where Evidence Consists Entirely of Affidavits, an exception to the rule concerning the inquiry as to time, place, and circumstances necessarily exists, and the contradictory statements may be proved by counter-affidavits: *Dobney v. Mitchell*, 66 Ala. 495.

IMPEACHING WITNESS BY WRITTEN CONTRADICTORY STATEMENTS.—When it is sought to impeach a witness by letters, or other writings written by him, and containing statements contradictory to his testimony, the writing must first be shown to the witness, and then he may be asked whether he wrote it. The proper course is to put the writing into the hands of the witness, or to attach it to his interrogatories, and then to ask him whether it is his writing: *Stamper v. Griffin*, 12 Ga. 450; *Pest v. Parchen*, 52 Iowa, 46; *Leonard v. Kingsley*, 50 Cal. 628; *Queen's Case*, 2 Brod. & Bing. 286; *Stephens v. People*, 19 N. Y. 549; *Newcomb v. Griswold*, 24 Id. 298; *Gaffney v. People*, 50 Id. 223; *Callanan v. Shaw*, 24 Iowa, 441; see *Randolph v. Woodstock*, 35 Vt. 291; 1 Whart. Ev., sec. 68; 1 Greenl. Ev., sec. 465. It is not proper to state the contents of the letter to the witness and ask him if he wrote such a letter; the letter must be shown to him: *Queen's Case*, 2 Brod. & Bing. 286; *Macdonnell v. Evans*, 11 Com. B. 930. And when the letter is shown to him, he must be allowed time to notice its contents: *Morrison v. Myers*, 11 Iowa, 538. A witness cannot be asked on cross-examination, after a letter in his own handwriting has been shown to him, "Did you not write that letter in answer to a letter charging you with forgery?" for it assumes the existence of the latter letter, and is an attempt to get at the contents of it without producing it. It must either be produced or its absence accounted for: *Macdonnell v. Evans*, 11 Com. B. 930. It has been held that a party to an action may be asked in cross-examination as to the contents of a paper written by him, without producing the paper: *Sladden v. Sergeant*, 1 F. & F. 322; *Farrow v. Blomfield*, Id. 653. But these cases can hardly be considered authoritative. Two or three lines of a letter may be exhibited to the witness, and he may be asked whether he wrote that part: *Queen's Case*, 2 Brod. & Bing. 286.

Where a party proposes to impeach a witness by proving inconsistent written statements, it is sufficient to show the witness or read to him the paper, and if its genuineness is admitted, the party can introduce it when he has the case and the right to introduce evidence; and it is not the legal right of the other party or the witness to enter into any explanation of the contents of the paper until after it has been introduced in evidence. It is within the discretion of the court, however, to vary the order of proof: *Romertae v. East River Nat. Bank*, 49 N. Y. 577. If the counsel who cross-examines puts a paper into the witness's hand and questions him upon it, "if anything comes of those questions," the adverse counsel has a right to see the paper and re-examine upon it. But if nothing comes of the cross-examination, the opposite counsel has no right to see the paper: *Regina v. Duncombe*, 8 Car. & P. 369. When the witness on cross-examination admits that he wrote a paper containing a contradictory statement, the paper may be read to the jury, and the party introducing the witness may, if the paper really contradicts his testimony, recall the witness and question him concerning the paper: *Crowley v. Page*, 7 Id. 789. And where the witness has admitted that he wrote the letter, it may be offered in evidence without examining him as to its contents: *State v. Stein*, 79 Mo. 330. And when the witness on cross-examination admits

that he wrote a letter containing a different statement from the statement he gave in evidence, and with the letter before him states its contents to the jury, the adverse party is entitled to read the letter to the jury: *Lewis v. Post*, 1 Ala. 65. When the cross-examining counsel asks the witness whether he has made certain statements, the adverse counsel is justified in breaking in upon the cross-examination by immediately asking whether such statements were made orally or in writing. Then, if the answer is that they were made in writing, the writing must of course be produced and shown to the witness: *Queen's Case*, 2 Brod. & Bing. 292-294.

IMPEACHMENT ON GROUND OF CHARACTER OR REPUTATION.—This subject is treated in the note to *Evans v. Smith*, 17 Am. Dec. 76, 77; see also the note to *People v. Genung*, 25 Id. 594, note 596. The general character of a witness may be shown for the purpose of impeaching his credibility, but particular acts or a particular evil pursuit cannot be proved: *Crane v. Thayer*, 46 Id. 142; *State v. Shields*, 53 Id. 147; *Phillips v. Kingfield*, 36 Id. 760; *Hart v. Reed*, 35 Id. 179; *Commonwealth v. Churchill*, 45 Id. 229; *Allen v. Young*, 17 Id. 130; *State v. Dewolf*, 20 Id. 90; *Gilchrist v. McKee*, 28 Id. 721; *Evans v. Smith*, 17 Id. 74, and note 76, 77; *People v. Genung*, 25 Id. 594, note 596.

Laying Foundation for Proof of Character for Veracity.—The proper form of interrogatory is first to ask the impeaching witness whether he knows the character or reputation of the witness in his neighborhood; then whether it is good or bad; and then, if he answers that it is bad, whether, from his knowledge of that reputation, he would believe the witness under oath; *Dufresne v. Weiss*, 46 Wis. 290; *Wilson v. State*, 3 Id. 698; *Meynicke v. State*, 68 Ind. 401; *Phillips v. Kingfield*, 19 Me. 375; S. C., 36 Am. Dec. 760; *People v. Mather*, 4 Wend. 229; S. C., 21 Am. Dec. 122; *Cook v. Hunt*, 24 Ill. 535; *Wetherbee v. Norris*, 103 Mass. 565; *King v. Ruckman*, 20 N. J. Eq. 313; *Bogle v. Kretmer*, 46 Pa. St. 465; *Ford v. Ford*, 7 Humph. 92. The witnesses must first swear that they know his general character for truth and veracity, otherwise they cannot be heard: *Cook v. Hunt*, 24 Ill. 535. When impeaching witness states that he does not know the general character of the witness, he should be told to stand aside. Counsel have no right to cross-examine their own witnesses: *State v. Perkins*, 66 N. C. 126. When a witness testifies that he has not heard the reputation of another witness for truth and veracity talked of a great deal, it is not error to refuse to allow him to be asked the questions, "Have you heard his character for truth and veracity called in question?" "If so, state what is his general reputation for truth and veracity among those who speak of it at all:" *Commonwealth v. Lawler*, 12 Allen, 585. In *Wetherbee v. Norris*, 10 Mass. 565, it was held that it is discretionary with the judge to require the impeaching witness first to be asked whether he knows the reputation of the witness for truth and veracity. Where the witness is to be questioned as to his opinion of the credibility of the other witness (see *infra*), the questions must be so framed that the witness shall give his answer as based upon his knowledge of the general reputation of the other witness. The full form given above need not be followed, but the witness cannot be asked without preliminaries, "Would you believe him under oath?" The witness must first be asked, "Do you know the general reputation of this witness?" then, "From your knowledge of his reputation, would you believe him under oath?" His opinion as to the witness's credibility on oath must be based on his knowledge of the witness's reputation: *People v. Rector*, 19 Wend. 569; *People v. Mather*, 4 Id. 229; S. C., 21 Am. Dec. 122; *Chess v. Chess*, 1 Penr. & W. 32; S. C., 21 Am. Dec.

300; *Blue v. Kibby*, 1 T. B. Mon. 195; S. C., 15 Am. Dec. 95; *Mobley v. Hamit*, 1 A. K. Marsh. 590; *Taylor v. Smith*, 16 Ga. 7; *Stokes v. State*, 18 Id. 17; *State v. Howard*, 9 N. H. 455; *State v. Boswell*, 2 Dev. L. 209, 211; *Anonymous*, 1 Hill S. C., 258; *Wise v. Lightner*, 11 Serg. & R. 198; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Hobert v. State*, 9 Tex. App. 219; S. C., 35 Am. Rep. 728; *State v. Meadows*, 18 W. Va. 658; *Wilson v. State*, 3 Wis. 698; *United States v. Van Sickel*, 2 McLean, 219. The first question put in the form, "What is his character for truth and veracity?" is said to be preferable, as more direct: *People v. Rector*, 19 Wend. 569. A witness who is ignorant of the general character of another witness cannot be permitted to testify as to his belief of the credibility of such witness: *Stanton v. Parker*, 5 Rob. (La.) 108; S. C., 39 Am. Dec. 528; *State v. Boswell*, 2 Dev. L. 209, 211; *Lyman v. Philadelphia*, 56 Pa. St. 488. In *King v. Buchanan*, 20 N. J. Eq. 316, it was held that the reputation of the witness must be proved bad in order to impeach him, and that the testimony of a witness that from his knowledge of his general reputation he would not believe him under oath is not sufficient. The opinion of a witness as to the credibility of a witness under oath must be based solely upon his general reputation, and it is error to overrule an objection to the question, "From that reputation, would you or not, in a case where he was personally interested, believe him under oath?" This allows the witness to encroach upon the province of the jury in weighing the effect of interest upon credibility: *Massey v. Farmers' Bank*, 104 Ill. 327; *contra*: *Knight v. House*, 29 Md. 194.

Impeaching Witness may be Asked whether from his Knowledge of General Reputation of Other Witness He would Believe Him under Oath. This is the ancient and well-established practice in England: 1 Phill. Ev. 229; Peaks's Ev. 88; 1 Stark. Ev. 182; *Maxson v. Hartsink*, 4 Esp. 104; *Carbo v. Brook*, 10 Vea. 50; *Rex v. Brown*, 10 Cox C. C. 453; S. C., L. R. 1 C. C. 70; and is now the practice in most of the United States: *Bullard v. Lambert*, 40 Ala. 204; *McCutchen v. McCutchen*, 9 Port. 650; *Stephens v. Irwin*, 12 Cal. 306; *Taylor v. Smith*, 16 Ga. 7; *Stokes v. State*, 18 Id. 17; *Massey v. Farmers' Bank*, 104 Ill. 327; *Mobley v. Hamit*, 1 A. K. Marsh. 590; *Blue v. Kibby*, 1 T. B. Mon. 195; S. C., 15 Am. Dec. 95; *Stanton v. Parker*, 5 Rob. (La.) 108; S. C., 39 Am. Dec. 528; *Knight v. House*, 29 Md. 194; *Hamilton v. People*, 29 Mich. 173, 185, et seq.; *Keator v. People*, 32 Id. 484; *State v. Howard*, 9 N. H. 455; *People v. Mather*, 4 Wend. 229; S. C., 21 Am. Dec. 122; *People v. Rector*, 19 Wend. 569; *People v. Davis*, 21 Id. 309; *State v. Boswell*, 2 Dev. L. 209, 211; *Chess v. Chess*, 1 Penr. & W. 32; S. C., 21 Am. Dec. 350; *Wise v. Lightner*, 11 Serg. & R. 198; *Bogle v. Kreitzer*, 46 Pa. St. 465; *Lyman v. Philadelphia*, 56 Id. 488; *Anonymous*, 1 Hill (S. C.), 258; *Ford v. Ford*, 7 Humph. 92; *State v. Meadows*, 18 W. Va. 658; *Wilson v. State*, 3 Wis. 698; *United States v. Van Sickel*, 2 McLean, 219. In some few states it is held that the witness may not be asked whether he would believe the impeached witness under oath; and that this case forms no exception to the general rule that the opinions of witnesses are not admissible: *Phillips v. Kingfield*, 19 Me. 375; S. C., 36 Am. Dec. 760; *Walton v. State*, 88 Ind. 9; *Hooper v. Moore*, 3 Jones L. 428; see *Gass v. Stinson*, 2 Sumn. 610; *Wood v. Mann*, Id. 321. The controversy upon this matter has arisen mostly out of a statement made in 1 Greenl. Ev., sec. 461, to the effect that the American authorities disfavored the English rule. But the authorities cited are few, and contain mere dicta. The only case in which the matter was really considered, though even there it was not directly involved, is *Phillips v. Kingfield*, 19 Me. 375, S. C., 36 Am. Dec. 760, and that case, which is carefully reasoned, held that the

question was not permissible, as it substituted the opinion of witnesses for the determination of the jury upon a point pre-eminently for their sole decision, that is, the credibility of witnesses. This case was cited in a note to 2 Taylor's Ev. 1250, and meeting the eyes of the English bar, its reasoning was urged before the English judges as a ground for changing the old rule, and excluding the question. But the court of *nisi prius* refused to do so, on the ground that the practice was too ancient to be changed, and this decision was affirmed on appeal: *Rex v. Brown*, 10 Cox C. C. 453; S. C., L. R. 1 C. C. 70. In the great majority of the courts of the United States, notwithstanding the reasoning of *Phillips v. Kingfield*, *supra*, it has been deemed expedient to regard this matter as one of the well-recognized exceptions to the rule concerning the opinions of witnesses; for it is very necessary that the jury should know what the witness means by a bad reputation for truth and veracity, and to what extent it affects the credit of the witness. There is no way so effectual of finding out how bad the reputation is as by asking whether the witness is worthy of belief under oath. Therefore, opinions as to the credibility of a witness are to be admitted upon the same ground as opinions concerning insanity, disposition or temper, distances and velocities, and many other cases where the witness is required only to show his means of information, and then is allowed to state his conclusions or belief, based on these means: *Per Campbell, J.*, in *Hamilton v. People*, 29 Mich. 187. The opinion in this case is well worth reading.

The Texas supreme court is subtle. It is there maintained that the impeaching witness, after testifying that the witness's reputation for truth is bad, may be asked whether he is worthy of belief on oath, but not whether he would believe him on oath. The witness must be asked to testify what the general reputation of the impeached witness is as to deserving credit on oath: *Blunt v. State*, 12 Tex. App. 39; *Holbert v. State*, 9 Id. 219; S. C., 35 Am. Rep. 738; *Marshall v. State*, 5 Tex. App. 273. Even admitting the theoretical accuracy of this distinction, its practical efficiency is doubtful. In answer to such questions, the vast majority of witnesses would testify from their own opinion of the witness's credibility on oath, being unable or too careless to make the distinction between their own opinion and the general reputation. The distinction may, however, provide an attorney with an additional ground of exception, and may perhaps be the means of saving some wretch's life. It may thus procure the approbation at least of both attorneys and philanthropists.

Cross-examination.—Great latitude is to be allowed in the cross-examination of witnesses who impeach the character of a witness touching their means of knowledge: *State v. Perkins*, 66 N. C. 126; *Lower v. Winters*, 7 Cow. 263; *State v. Miller*, 71 Mo. 91; *Weeks v. Hull*, 19 Conn. 376; S. C., 50 Am. Dec. 249; *Holbert v. State*, 9 Tex. App. 219; S. C., 35 Am. Rep. 738. For it is highly important that the witness should understand what is meant by reputation, and that it should appear that he is not influenced in his testimony by personal prejudice or mere unfounded impressions. The latitude of the cross-examination of the impeaching witness is a matter for the discretion of the court, and is not reviewable unless there has been a clear abuse of legal discretion: *Arnold v. Nye*, 23 Mich. 286; *Stewart v. People*, Id. 63. The cross-examination may bring out the sources of the reports concerning the reputation for truth: *Annis v. People*, 13 Id. 511. It may extend to the opportunities for knowing that reputation, for how long a time, and how generally the unfavorable reports had prevailed, and from whom they were heard: *Phillips v. Kingfield*, 19 Me. 375; S. C., 36 Am. Dec. 760. It

may embrace the means of knowledge of the reputation of the witness, the origin of the reports against him, how generally such reports have prevailed, and from whom and when the witness heard them: *State v. Howard*, 9 N. H. 485; *People v. Mather*, 4 Wend. 229; S. C., 21 Am. Dec. 122; *Weeks v. Hull*, 19 Conn. 376; S. C., 50 Am. Dec. 249. An impeaching witness may be asked, on cross-examination, to state the names of all persons whom he has heard speak against the reputation of the witness impeached: *Bates v. Barber*, 4 Cash. 107; *State v. Miller*, 71 Mo. 91; *Lower v. Winters*, 7 Cow. 263; *State v. Perkins*, 66 N. C. 126; and when the witness has given the names of such persons, he may be required to state what was said by them respectively: *Annis v. People*, 13 Mich. 511; *State v. Perkins*, 66 N. C. 126. He may be asked whether his opinion is made up from his own knowledge or from what he heard his neighbors say: *State v. Meadows*, 18 W. Va. 658; and whether he had ever heard a majority of his neighbors speak of the witness's character: *Id.* He may be cross-examined as to what constitutes reputation: *Hatts v. Hatts*, 62 Ind. 214; S. C., *Id.* 240; and may be shown not to understand what is meant by character in its proper legal signification: *Bullard v. Lambert*, 40 Ala. 204. Where, however, in cross-examination of an impeaching witness, a party calls out particular facts tending to show that his witness is not worthy of belief, these facts may be considered by the jury: *Steeple v. Newton*, 7 Or. 110.

Notice of Intention to Impeach not Necessary.—Where a party to a cause has been sworn as a witness, the opposite party may offer evidence impeaching his veracity without first giving notice of such intention. In the case of ordinary witnesses, the practice is to allow such evidence without any previous notice, the presumption being that every witness should be prepared to sustain his character, and there is no reason why the practice should be changed when a party becomes a witness: *Knight v. House*, 29 Md. 194.

Question concerning Belief on Oath not Indispensable.—An instruction that a witness is not impeached unless the impeaching witnesses not only testify to his bad character, but also that they would not believe him on oath, is erroneous. The credibility of the witness is for the jury to decide, and the mere fact that the impeaching witnesses fail to state that they would not believe the witness under oath does not authorize the court thus to remove the question of the witness's credibility from the jury: *People v. Tyler*, 35 Cal. 553. A witness cannot, however, be asked concerning the general bad character of a witness, unless he is also to be asked whether he would believe the witness under oath, or unless in addition to the proof of the witness's general bad character it is also proved that his character for truth and veracity is bad: *Gilbert v. Sheldon*, 13 Barb. 623.

Miscellaneous.—A witness who testifies that he has no knowledge of the general character of another witness except from report may then be asked to testify as to the general character for truth of such witness. His knowledge from common report is sufficient: *Kimmel v. Kimmel*, 3 Serg. & R. 336; S. C., 8 Am. Dec. 655. One who testifies that he knows the general character of a witness, but nothing of his character for truth and veracity, may be asked whether, from his knowledge of the witness's general character, he would believe the witness under oath: *Johnson v. People*, 3 Hill (N. Y.), 178; S. C., 38 Am. Dec. 624. A question, "Have you heard of others whether the witness is a dishonest man and a bad character?" is bad, as it is too narrow; the question is, What is said by people in general? *Wibe v. Lightner*, 11 Serg. & R. 198. The witness's character or reputation for truth, upon whatever based, is to be proved as a fact in the case: *Phillips v. Kingfield*, 19 Me. 375; S. C., 36 Am. Dec. 760.

Number of Witnesses Discretionary with Court.—The number of impeaching witnesses to be examined as to character is a matter within the discretion of the court: *State v. Marler*, 2 Ala. 43; *Cox v. Pruitt*, 25 Ind. 90; *Gray v. St. John*, 35 Ill. 322; and the proper exercise of such discretion is not ground of error: *Bunnell v. Butler*, 23 Conn. 65. When the first witness to impeach the general character of a witness was called, the court limited the number to six on each side: *Id.* Where the number of witnesses sworn on each side is equal, it is discretionary with the judge whether more witnesses shall be examined: *Bissell v. Cornell*, 24 Wend. 354.

Hostility or Enmity of Witness against Party may be proved by evidence of previous acts or declarations, or of a dispute or quarrel: Note to *Blue v. Kibby*, 15 Am. Dec. 100; *McHugh v. State*, 31 Ala. 317; *Bullard v. Lambert*, 40 Id. 204; *Polk v. State*, 62 Id. 237; *Haley v. State*, 63 Id. 83; *Conyers v. Field*, 61 Ga. 258; *Long v. Lambkin*, 9 Cush. 361; *Day v. Stickney*, 14 Allen, 260; *Titus v. Ash*, 24 N. H. 319. The impeaching witness may be asked whether he has had a quarrel with the witness whom he discredits: *Long v. Lambkin*, 9 Cush. 361.

The same foundation as is laid for introducing prior contradictory statements is equally necessary to the introduction of evidence of declarations or acts of hostility or ill feeling on the part of the witness: *Baker v. Joseph*, 16 Cal. 173; *State v. Stewart*, 3 West Coast Rep. 229 (Or.); *Booker v. State*, 4 Tex. App. 564. A witness's partiality to the party introducing him cannot be shown unless the witness has been previously questioned himself on that point: *Edwards v. Sullivan*, 8 Ired. L. 302.

It is not competent for either party to inquire into the cause of the quarrel or the particulars of the difficulty. This would introduce too much irrelevant matter. Simply the bias, and the declarations and acts evidencing it, may be shown: *Polk v. State*, 62 Ala. 237; *Munden v. Bailey*, 70 Id. 63; *Butler v. State*, 34 Ark. 480, 484; *Cornelius v. State*, 12 Id. 782, 800; *Conyers v. Field*, 61 Ga. 258; *Chelton v. State*, 45 Md. 564; *Langhorne v. Commonwealth*, 76 Va. 1012; *State v. Glynn*, 51 Vt. 577. Therefore a witness cannot be asked on cross-examination if she had not heard from a certain person that the defendant had spoken scandalous matter about her impugning her character and virtue: *Butler v. State*, 34 Ark. 480, 484. In New Hampshire, a party may prove not only the fact that there was a quarrel between himself and the witness, but also the circumstances that show that it was serious and violent: *Titus v. Ash*, 24 N. H. 319. It has also been held that where it is shown that a prisoner is generally unpopular in the neighborhood, and the evidence of his guilt rests solely on the testimony of one witness who was also unfriendly to the prisoner, the prisoner should be permitted to show the cause of his unpopularity: *Durham v. State*, 45 Ga. 516. When bias in favor of a party has been attempted to be proved, it is permissible to prove a bias against such party: *Clapp v. Wilson*, 5 Denio, 289. Where the plaintiff to show bias and prejudice against him of a witness called by the defendant introduced two letters addressed to him by the witness, he may introduce a letter written by himself, to which the second letter was a reply: *Trischet v. Hamilton Ins. Co.*, 14 Gray, 456.

CONVICTION OF INFAMOUS CRIME.—For the purpose of impeaching a witness's incredibility, he may be shown to have been convicted of an infamous crime: *Commonwealth v. Knapp*, 9 Pick. 49; *Commonwealth v. Gorham*, 99 Mass. 420; *In re Real*, 55 Barb. 186; *Donahue v. People*, 56 N. J. L. 208; *Dickinson v. Dustin*, 21 Mich. 561; *Glenn v. Clove*, 42 Ind. 62; *Jefferson R. R. v. Riley*, 39 Id. 368; *Johnson v. State*, 48 Ga. 116; Whart. Ev., sec. 567. A

party who would take advantage of the exception that a witness has been convicted of the *crimen falsi* must have a copy of the record of conviction ready to produce in court: *People v. Herrick*, 13 Johns. 82; S. C., 7 Am. Dec. 384; *Blaufus v. People*, 69 N. Y. 110. The conviction must be proved by the record: *Bartholomew v. People*, 104 Ill. 601; S. C., 44 Am. Rep. 97; *Farley v. State*, 57 Ind. 331; and the record is conclusive: *Commonwealth v. Gallagher*, 126 Mass. 54. The record of the penitentiary is not admissible to show a conviction: *Bartholomew v. People*, 104 Ill. 601; S. C., 44 Am. Rep. 97. To impeach a witness's credibility, it is competent to produce the record of his conviction, in another state, for shop-breaking with intent to steal: *Commonwealth v. Knapp*, 9 Pick. 496; S. C., 20 Am. Dec. 491. But the record of a conviction of a felony in another state is not conclusive; and after the introduction of such a record, the witness may be asked by his counsel whether he was guilty of the offense: *Sims v. Sims*, 75 N. Y. 466. Under section 2051 of the California code of civil procedure, a witness may be impeached by asking him if he has been convicted of a felony. The conviction of a misdemeanor, however, must be proved by the record of conviction: *People v. Schenick*, 4 West Coast Rep. 77; *People v. Chin Mook Sora*, 51 Cal. 597; and the party asking the question may introduce the record of his conviction: *People v. Chin Mook Sora*, *supra*. It is not admissible to ask a witness if he has not been convicted of an offense which does not involve his character for truth on oath: *Langhorne v. Commonwealth*, 76 Va. 1012. A defendant indicted for a felony, if he be a witness, may be asked whether he has previously been convicted of a felony: *People v. Johnson*, 57 Cal. 571. The question, "How many times have you been arrested?" cannot be asked of a witness, though he be the defendant in a criminal trial, as it tends to degrade the witness, but whether it was competent as bearing upon the credibility of the witness was not decided: *People v. Brown*, 72 N. Y. 571. It is said to be discretionary with the court to allow this question, in *People v. Cummins*, 47 Mich. 334; see *Farley v. State*, 57 Ind. 331.

IMPEACHMENT OF PARTY TO ACTION.—In some states the fact that the witness is a party to the suit does not change the rule as to the manner of impeachment, but the same method must be pursued, and the same foundation laid, as in the case of any other witness: *Kelsey v. Layne*, 28 Kan. 218; *Davis v. Franke*, 33 Gratt. 413; *Varona v. Socarras*, 8 Abb. Pr. 302. In other jurisdictions it makes a material difference in the manner of impeachment that the witness to be impeached is a party to the suit. Thus in Arkansas and Pennsylvania, where a party to a suit becomes a witness, it is not necessary to lay the usual foundation for proving previous admissions contradictory to the party's testimony: *Collins v. Mack*, 31 Ark. 684; *Kreiter v. Bomberger*, 82 Pa. St. 59. And it has been held in England, at *nisi prius*, that a party to the action may be asked in cross-examination as to the contents of a paper written by him, without producing the paper: *Sladden v. Sergeant*, 1 F. & F. 322; *Farrow v. Blomfield*, Id. 653. When a plaintiff as a witness testifies in his own behalf, the original verified complaint is admissible to impeach him, though an amended complaint has been filed: *Johnson v. Powers*, 2 West Coast Rep. 740 (Cal.).

IMPEACHING ONE'S OWN WITNESS: See note to *Burkhalter v. Edwards*, 60 Am. Dec. 749-752. A party after cross-examining a witness of the other side may by permission of the court recall and question him for the purpose of impeaching him, and afterwards introduce other testimony to that end. He does not by so recalling him make him his own witness: *State v. Jones*, 64 Mo. 391. Under the Massachusetts statute of 1890, a party may contradict

his own witness by proving prior contradictory statements, after first calling his attention to the circumstances of the statement: *Commonwealth v. Donahoe*, 133 Mass. 407; *Newell v. Homer*, 120 Id. 277. Merely calling attention to person, without time or place or circumstances, is not sufficient: *Commonwealth v. Thynq*, 134 Id. 191.

INTOXICATION.—A witness may be impeached by showing that at the time the facts sworn to occurred he was intoxicated. The intoxication must, however, be proved by direct evidence, or by the acts and conduct of the witness, and not by the quantity of intoxicating liquor he had imbibed: *Tuttle v. Russell*, 2 Day, 201; S. C., 2 Am. Dec. 89; see 1 Whart. Ev., sec. 104.

IMPEACHMENT OF MEDICAL WITNESS.—A medical witness who has testified from his own knowledge and experience cannot be impeached by reading to the jury extracts from medical works: *Knoll v. State*, 55 Wis. 249.

IMPEACHMENT IN EQUITY.—If a party would object to the credibility of a witness in a court of equity, he must make a special application by petition to the court for liberty to exhibit articles, stating the facts and objections to the witness, and praying leave to examine other witnesses to establish the allegations in the articles, and upon this petition, leave is ordinarily granted by the court. It seems that the application may be made by motion upon the foundation of ignorance at the time of the examination: *Gass v. Stinson*, 2 Sumn. 605.

INSTRUCTION SHOULD NOT ASSUME CONTESTED FACTS: *Tyner v. Stoops*, 71 Am. Dec. 341, and cases cited in the note 348.

KIND OF GUN USED AND OF SHOT WITH WHICH IT WAS CHARGED need not be specified in indictment for homicide by shooting: *Dukes v. State*, 71 Am. Dec. 370, note 380.

ACT DONE WITH FELONIOUS INTENT CONSTITUTES NO FELONY unless coupled with present ability and means to execute: *State v. Swails*, 65 Am. Dec. 772. The doctrine of this case is, however, limited in *Kunkle v. State*, 32 Ind. 232, which holds, citing the principal case, that to justify a conviction of an intent to murder, in the commission of an assault and battery, there must be some adaptation, real or apparent, in the act done and the means used to accomplish the alleged purpose. If it be evident to every reasonable mind that the means used are entirely inadequate to the consummation of the intent charged, that fact will rebut or disprove the felonious intent, and a conviction cannot be justified. But where the object is not accomplished because of an impediment which is of such a nature as to be wholly unknown to the offender who uses appropriate means, though not fully or only apparently adapted to the object, the criminal attempt is committed. See also the note to *State v. Swails*, *supra*.

TO CONSTITUTE JUSTIFICATION FOR HOMICIDE, THERE MUST EXIST NECESSITY TO PREVENT COMMISSION OF FELONY or great bodily harm, or a reasonable belief in the mind of the slayer that such necessity exists: *Noles v. State*, 62 Am. Dec. 711, and note; *Campbell v. People*, 61 Id. 49, and note.

SOUTH CAROLINA R. R. Co. v. MOORE & PHILPOT.

[28 GEORGIA, 398.]

EITHER PARTY MAY EXCEPT TO AWARD ON GROUND OF MISTAKE, though the statute concerning arbitration provides for exceptions to awards only on the ground of fraud or corruption in the arbitrators, where, while a case is pending in court, a rule referring the case to arbitrators is made by order of the court with the consent of the parties, which rule provides for an exception to the award on the ground of fraud, accident, or mistake, and that the arbitrators be guided by the rules laid down in the statute for the regulation of arbitrators; and in a subsequent submission of the same and additional matters to arbitration, the parties adopt both the rule of court and the statute to control the arbitration; for from the rule of court and the submission it will be concluded that the parties intended that the arbitrators should be guided in their proceedings by the statute, but that the award might be excepted to on the ground of "fraud, accident, or mistake."

ARBITRATOR SHOULD NOT BE ALLOWED TO IMPEACH HIS AWARD eight days after it has been rendered, *semble*.

PUBLIC NUISANCE IS SUBJECT OF INDICTMENT, NOT OF ACTION.

OBSTRUCTION OF NAVIGABLE RIVER IS PUBLIC NUISANCE.

PERSON SUFFERING PARTICULAR DAMAGE FROM PUBLIC NUISANCE MAY HAVE PRIVATE ACTION.

ACTION LIES FOR DAMAGES RESULTING FROM ACTUAL DETENTION OF PLAINTIFF'S BOAT when in the course of navigation, by reason of the erection of a bridge across the stream, but not for damages resulting from the general obstruction of the plaintiff's business; the only remedy in the latter case being an indictment as for a public nuisance.

COURT WILL SET ASIDE AWARD FOR MISTAKE OF LAW MADE BY ARBITRATORS and appearing upon the face of the award.

WHERE BY PROVISIONS OF SUBMISSION TO ARBITRATORS FEES OF COUNSEL FOR PLAINTIFF are to be deducted from the amount awarded to the plaintiff, and are to be paid by the defendant directly to the attorneys, the latter are not necessary parties to a motion to set aside the award, nor to a writ of error to the judgment upon the motion.

CASE by Moore & Philpot, who were the owners of a certain line of steamboats on the Savannah river, against the South Carolina Railroad Company, for damages alleged to have resulted from the construction of a railroad bridge across the Savannah river at the city of Augusta, which obstructed the navigation of the river. The original declaration set out the obstruction of the passage of the plaintiffs' steamboat *Fashion* from Augusta to Savannah for ten days, "and for the same length of time at each subsequent voyage between the places aforesaid," to the plaintiffs' damage in the sum of ten thousand dollars. The defendant pleaded the general issue; that it was duly authorized to build the bridge by the authorities of the city of Augusta and the county of Richmond; and that any

damage caused to the plaintiffs resulted from their own negligence or a providential cause. The jury found for the plaintiffs in the sum of two thousand dollars, and the defendant appealed. After the trial the plaintiffs, by order of court, amended their declaration, setting out, in addition to the damage alleged in the original declaration, that on account of the difficulty and risk in taking their boat above the railroad bridge they were obliged to abandon doing so altogether, and to unload their freight below the bridge, at some distance from Augusta, whence it was necessary to transport it by drays, which increased the time and expense of carriage; that other carriers on the river, who used tow-boats and barges, could pass under the bridge, and thus took much business from the plaintiffs, who, in order to save the expense of lighterage, had constructed steamboats of such light draught as to pass under another bridge upon the river, higher than the defendant's bridge, which was built afterwards; and by this means, together with the damages set out in the original declaration, the plaintiffs alleged that they had been injured in the sum of thirty thousand dollars. While the case was pending on appeal, a rule of reference to arbitration was taken and passed by the court, upon the consent of the parties. The material contents of this rule are stated in the opinion. Afterwards the parties entered into an agreement for submission to arbitration of all the matters involved on the appeal, and submitted by the rule of court, and in addition, the plaintiffs' claim for damages accruing to them from the construction of the bridge since the commencement of the suit and up to the date of the award to be rendered. And it was agreed to submit all these matters to arbitration, subject to the terms and provision of the statute of 1856 concerning arbitration, and to the rule of reference made by the court. The arbitrators awarded to the plaintiffs twenty-nine thousand nine hundred and ninety-two dollars and seventy-seven cents. The plaintiffs moved that the award be entered upon the minutes of the court. The defendant filed exceptions to this motion, and moved that the award be set aside, on the ground of mistake of the arbitrators in estimating damages: 1. Because they allowed damages for possible, prospective, and speculative profits, which the plaintiffs might have realized but for the erection of the bridge, though the defendant's counsel, on the hearing before the arbitrators, insisted that such profits were not legal ground for damages; 2. Because after allowing damages for such profits, they made no

deduction from their estimate on account of the profits actually realized by the plaintiffs during the time while the alleged injury was accruing. The defendant annexed as exhibits to these exceptions copies of communications addressed by one of the three arbitrators to his associates, and duly furnished by him to the parties in the case, or their counsel, the facts stated, in which communications were verified by the affidavit of the arbitrator. The exhibits were two letters, addressed by the arbitrator to his two associates respectively, in each of which he stated that since the making of the award he had come to a positive conviction that he was wrong in allowing damages for prospective freight, and in not deducting "a part of the probable income that Mr. Moore's boats had received in the prosecution of their trips for the two years after they commenced running to the Central wharf, as testified by Captain Philpot, and subsequently below the bridge." The defendant further excepted to any judgment being rendered in behalf of the plaintiffs, since "it appears on the face of the record that the plaintiffs have not, and never had, any sufficient cause of action against the defendant; but on the contrary, said plaintiffs, in their said action, claim damages for what by their own showing is a public nuisance, for which no private action lies." The court overruled the defendant's exceptions, and allowed the plaintiffs' motion, on the ground that the defendant could not except to the award on the ground of mistake, and that the plaintiffs had stated a cause of action. To this decision the defendant excepted.

William T. Gould and James L. Petigru, for the plaintiff in error.

Millers and Jackson, and E. Starnes, contra.

By Court, LUMPKIN, J. 1. The first question made in the record and discussed by counsel is, Was this an arbitration under the rule of court, or under the act of 1856, or both?

There was a case pending in court between these parties, and there was a rule of reference made of it by order of the court, with the consent of parties. Subsequently there was an agreement entered into out of court to submit, not only the matters embraced in the writ, but other matters in dispute not included therein, but germane to them. The agreement to submit provides distinctly that the arbitration shall be subject to the rule of reference taken in the case, as well as to the terms and provisions of the act of 1856.

Now, the rule of reference expressly declares that the award may be excepted to for "fraud, accident, or mistake." And yet counsel for the defendants in error insist, and so the court decided, that inasmuch as the act of 1856 authorizes an award to be excepted to only for fraud or corruption in the arbitrators, the alleged mistake in this award is not examinable into. His honor the presiding judge remarks: "But when the submission of the seventh of July, 1858 [it should have been the eleventh of June, 1858], the case of the parties as therein stated was brought strictly within the provisions of the act under which the submission was made;" meaning the act of 1856. Is this so? and is this conclusion drawn from the fact that the submission was subsequent to the rule of reference? This inference would have been legitimate had the submission failed to adopt the rule of reference, and the terms of the law had been repugnant. But instead of this, it recites the pending of the action between these parties, and the order of the court referring the matters in issue to arbitrators; and then stipulates, as we have already stated, that the arbitration shall be "subject to the rule of reference taken in the case." We confess we are unable to see how, under these circumstances, the rule of reference is superseded or abrogated by the submission, although the former be prior in point of time.

The most that can be said is that the submission, from inadvertence or some other cause, has presented two contradictory rules to control the arbitration and award. Upon what principle are the defendants in error entitled to the full benefit of the fifteenth and sixteenth sections of the act of 1856, and to insist that the award can be attacked only for fraud and corruption according to the fifteenth, or fraud or corruption according to the sixteenth, section of said act? May not the plaintiffs in error contend with equal plausibility and propriety that the award may be revised for "fraud, accident, or mistake," according to the rule of reference?

It is the duty of the court to harmonize, if possible, these apparently inconsistent stipulations in the submission so as to give effect to every part of it. The terms of the rule of reference itself, if carefully scrutinized, settle this difficulty conclusively. After providing that the award of the arbitrators shall be final between the parties, no appeal to any court lying therefrom "except for fraud, accident, or mistake," it was further ordered "that the parties have leave to be represented by their counsel before the arbitrators; and that the latter be

guided by the rules laid down for the regulation of arbitrators in the act of March 5, 1856."

Here we have a key to unlock the true intent of the parties, when they agreed in the submission that the arbitration shall be subject both to the terms of the act of 1856 and of the rule of reference; they intended that the arbitrators should be guided in their proceedings by the act of 1856, examining the parties as witnesses, etc., but imposing no restriction upon the right of either to except to the award for "fraud, accident, or mistake." This we hold to be the obvious and undoubted construction of the submission.

2. Was the alleged mistake inquirable into, upon the disclosures made by Joseph Milligan, one of the arbitrators? We do not find it necessary to decide this point under the further view which we have taken of this case. We will say, however, that we see serious objections against permitting an arbitrator to impeach his award, as well as a juror his verdict, long subsequent to the time when the finding has been rendered. The award in this case was signed the seventh day of July, 1858, the parties were furnished each with a copy on the eighth, and no complaint is made by the arbitrator until the fifteenth of that month. Jurors no doubt often become dissatisfied with their verdicts, and courts with their judgments; still they must stand as the law of the case. If the fact be as alleged in Milligan's letter, that the arbitrators awarded to the plaintiffs a gross amount of possible profits and deducted nothing for the profits shown to have been actually made, the law certainly would provide some way to enable the defendants to ascertain and correct an error so gross.

3. This brings us to the last and main ground of objection to the award, and that is the want of sufficient cause of action against the defendants apparent on the face of the record. The plaintiffs in error maintain that the defendants in error claim in their declaration and by the submission damages for what, by their own showing, is only a public nuisance, for which no private action lies.

There is no dispute that the general rule of law is, that a private action will not lie for a public nuisance. It is the subject of indictment, not of action. The reason of the rule is, that it would create a multiplicity of actions, one being as well entitled to bring an action as another, and therefore, in cases of public nuisance, the remedy must be by indictment: Co. Lit. 56 a; Roll. Abr. 88-110; *Anonymous*, Moore, 180; 2 Brownl

147; *Thomas v. Sorrell*, Vaugh. 341; *Fineux v. Hovenden*, Cro. Eliz. 664; *Rez v. Betterton*, 5 Mod. 142; Carth. 171; *Iverson v. Moore*, 1 Salk. 15; 3 Bla. Com. 219; *The Justices v. Griffin*, 15 Ga. 61, 62. The declaration and submission set out a public nuisance—the obstruction of a navigable river.

To this general rule there is an exception, namely, that if by such a nuisance the party suffered a particular damage, as if by stopping up the highway by logs, any horse throws him, by which he is hurt or wounded, an action lies: Cro. Jac. 446; Keb. 849. Now the point at issue is, do the plaintiffs come within the exception?

In this, as in many other cases where the general principle has been departed from by ingrafting exceptions upon it, the line of demarkation frequently becomes too dim and attenuated to be distinctly visible or clearly stated. We have examined with some care the numerous precedents, English and American, upon this subject; and it is not quite satisfactory to myself to determine on which side the weight of authority preponderates. There is, therefore, a want of entire confidence in the result at which the court has arrived. The question has received various determinations, according to the circumstances of each case.

In *Pame v. Patrick*, Carth. 194, it was said by Lord Holt that if a highway be so stopped that a man is delayed a little while on his journey, by reason whereof he is damnified, or some important affair neglected, that it is not such a special damage for which an action on the case will lie; but that the damage ought to be direct, and not consequential, as the loss of his horse or some corporal hurt, in falling into a trench in the highway.

I will not refer to the case of *Hubert v. Groves*, 1 Esp. 148, decided by Lord Kenyon, and a strong case in favor of the defendants: 1. Because the authority of that case has been greatly shaken; and 2. Because it was adjudged since the revolution, and consequently, not to be regarded here further than its intrinsic merit demands.

The case of *Chichester v. Lethbridge*, Willes, 71, appears to be the last adjudged case in England on the subject prior to the revolution; and is the leading case relied on to uphold the contrary doctrine. It is briefly this: The defendant obstructed the highway by a ditch or gate across the road, by means of which the plaintiff was obliged to go a longer and more difficult way to and from his close; and the defendant opposed the

OBSTRUCTION OF NAVIGABLE STREAM IS PUBLIC NUISANCE; *Dugan v. Bridge Co.*, 67 Am. Dec. 464, and cases cited in the note 471.

FOR SPECIAL DAMAGE RESULTING FROM OBSTRUCTION OF NAVIGABLE STREAM, RECOVERY MAY BE HAD: *Brown v. Chadbourne*, 50 Am. Dec. 641; *Fisk v. Lawrence*, Id. 274; *Martin v. Bliss*, 32 Id. 52.

STATUTE CONCERNING ARBITRATION, HOW AFFECTS SUBMISSION BY PARTIES: See *Conger v. Dean*, 66 Am. Dec. 93, note 96.

AWARDS WILL BE SET ASIDE IN EQUITY FOR FRAUD, ACCIDENT, OR MISTAKE in the absence of statutes: *Rand v. Reddington*, 38 Am. Dec. 475; *Muldrow v. Norris*, 56 Id. 313; *Emerson v. Udall*, 37 Id. 604.

EVIDENCE OF ONE ARBITRATOR AS TO HIS MISTAKE IN MAKING AWARD is not sufficient to set it aside, when the mistake does not appear on the face of the award or elsewhere, and is denied by his fellow-arbitrator: *Pollard v. Lumpkin*, 52 Am. Dec. 128.

AWARD WILL BE SET ASIDE FOR MISTAKE OF LAW APPEARING ON ITS FACE: *Muldrow v. Norris*, 56 Am. Dec. 313; see *Byars v. Thompson*, 37 Id. 680.

TILLMAN v. DAVIS.

[28 GEORGIA, 494.]

SHERIFF'S RETURN OF SERVICE ON WRIT CANNOT BE TRAVERSED by parties or privies, except for fraud or collusion.

ACTION on promissory note against Dennard and Davis. From the entries upon the original and second original declarations, both parties appear to have been regularly served. Verdict and judgment were for the plaintiff. Davis moved to set aside the judgment, on the ground that he was only a surety on the note, and that he gave the plaintiff notice to sue the principal; that the suit was brought against himself and the principal within three months after that notice, but the principal was never duly served with the writ; that he was not served until after the term of court passed to which the writ was sued, and therefore the court had no jurisdiction of the suit; and that Dennard was insolvent. And these facts Davis offered to prove. The court denied the motion, and Davis excepted. The court overruled the exceptions, and Davis sued out a writ of *certiorari*. Upon the hearing of the *certiorari* in the superior court, it was admitted that the interrogatories of the sheriff had been taken since the hearing in the inferior court, and that the sheriff admitted that he had not served Dennard within the proper time, but that the service was made before the term to which the suit was brought, and by the consent of Dennard was dated back to the proper time. The court refused to consider any matter not disclosed by the record of the

lower court, and sustained the *certiorari*, and overruled the decision of the inferior court. Tillman excepted and assigned error.

West, and Kimbrough and Bass, for the plaintiff in error.

Vason and Davis, and McCay and Hawkins, contra.

By Court, LUMPKIN, J. Of course the testimony of Boynton, the sheriff of Dougherty county—taken after the case was decided in the inferior court—was properly disregarded upon the hearing of the *certiorari*. Had that evidence been in, it would have sustained the return of Boynton, the sheriff; and we should have been saved the necessity of inquiring whether the return of that officer, as it stands, can be controverted. The case depends upon the decision of that question. If Dennard was regularly served, as he appears to have been by the return of the sheriff, Davis was concluded by the judgment.

The question has not been adjudicated by this court. It is true that in *Higgs v. Huson*, 8 Ga. 317, this court said an official return by the sheriff on a *ca. sa.* or *fi. fa.* could not be controverted; and that a party injured by a false return of this sort is remitted to his action against the sheriff. But that point was not really in the case, nor was the judgment of the court put upon that ground.

So in *Parker v. Jennings*, 28 Ga. 140, this court permitted a defendant in execution to resist the payment of the *fi. fa.* by affidavit of illegality, where there was an entry of service upon the writ by the sheriff, that he had left a copy at the defendant's most notorious place of abode; it appearing, or at least being conceded, that the defendant at the time resided in a different county. But the point discussed and decided there was whether, when the defendant has not been served, he can get rid of the judgment by affidavit of illegality. And the proposition as to the right of the party to traverse the sheriff's return was not raised or considered.

We shall treat the question, therefore, as *res integra* in this court.

Upon examination it will be found that the conclusiveness of the sheriff's return, both upon mesne and final process, is assumed as one of the axiomatic truths of the law, and the principle is found scattered broadcast throughout the whole of the text-books and reports, both in England and in this country, except in the state of Connecticut, where a contrary doctrine has obtained.

"The return of a sheriff," says Baron Comyn, "is of such

high regard that generally no averment shall be admitted against it. As if A be returned to be outlawed, he cannot say that he was only *quarto* or *quinto exactus*: Kit. 280. If the sheriff return issues upon B, it cannot be averred by A, to save the issues, that his name is not B: 2 Roll. 462, l. 5. If the sheriff in *redisseisin* returns *accessi ad terras*, etc., it cannot be assigned for error, *quod non accessit*: 1 Leon. 183. If coroners make a return, it cannot be said that only one made the return: Ld. Raym. 485. If a sheriff returns *scire feci A tenen' un' mess'*, A cannot plead *non tenet*: Cro. Eliz. 872; 2 Mod. 10: "6 Com. Dig., tit. Return, G, 290, 291.

Sheriff's return is not traversable; but you may have an action for a false return: Loft. 631; *Rex v. Elkins*, 4 Burr. 2129; *Barr v. Satchwell*, 2 Stra. 813.

But I will not multiply citations upon this point. I have investigated carefully in Brooke's and Viner's abridgments, and traced the question to its fountain-head, and find it well settled that by the common law no averment will lie against the sheriff's return, and one reason assigned amongst others is, that he is a sworn officer, to whom the law gives credit: Jenk. 143, pl. 98. There are some exceptions to the general rule in favor of life and liberty, and some modifications made by several ancient statutes. But they are slight and restricted to returns upon particular subjects, and do not affect the present case. It is also true, that while the return of the sheriff in certain cases will not be allowed to be controverted in the same action, an averment may be made contrary to the same return in another action.

I lay down another proposition, which seems to be uniform and incontrovertible: that a return of the sheriff which is definitive to the trial of the thing returned, as the return of the sheriff upon his writs, cannot be traversed: Brooke's Abr., tit. Averment; 19 Vin. Abr., tit. Return.

All the American authorities are collected in appendix to 2 Phill. Ev., Cowen & Hill's Notes, 794, note *d*, and, as I stated in the beginning of this opinion, with a solitary exception, there is an unbroken array of American cases in favor of the well-established English rule, that as between the parties to the process or their privies, the return of the sheriff is usually conclusive, and not liable to collateral impeachment, except for fraud or collusion—a rule so necessary to secure the rights of the parties, and to give validity and effect to the acts of ministerial officers, leaving the persons injured to their

redress by an action for a false return; and that this rule concluding the parties applied to mesne process, by which the parties are brought into court.

I will not consume time in reviewing the Connecticut cases. Suffice it to say that in *Watson v. Watson*, 6 Conn. 334, Chief Justice Hosmer, who delivered the meager opinion of the court, says, distinctly, that it is a general rule of the English common law that the return of the sheriff is conclusive, both as it respects mesne and final process, there being no distinction made between the two in Westminster Hall. But that in Connecticut a contrary doctrine had prevailed; and that he was unable to assign the precise reason for this departure from the English common law.

This concession is sufficient to satisfy a judge in Georgia what his duty is.

It may be supposed that to make the returns of an officer *prima facie* evidence of their truth would be a sufficient security for the rights of the people, and to prevent the perpetration of irreparable wrong. But that is a matter for the legislature, and not for the courts.

By the act of 1840 (Pamphlet, p. 40; Hotchkiss, 527), returns made under oath, by virtue of any rule or order of the court, are traversable. But the legislature has not seen fit to extend the right to the ordinary returns made by a sheriff on processes in his hands. Where they stop, we must stop.

STEPHENS, J., concurred.

BENNING, J., delivered a dissenting opinion.

RETURN OF SERVICE OF PROCESS IS CONCLUSIVE ON PARTIES TO RECORD, when collaterally called in question: *Reynolds v. Ingersoll*, 49 Am. Dec. 57; *Mentz v. Hamman*, 34 Id. 546, note 549; *Knowles v. Lord*, Id. 525; see *Jones v. Commercial Bank*, 35 Id. 419.

BETHUNE v. HUGHES.

[23 GEORGIA, 500.]

STATUTE EMPOWERING CITY TO ESTABLISH AND KEEP UP MARKET does not authorize the city to prohibit persons from selling elsewhere marketable articles within the market hours, though the statute contains a proviso authorizing the city to grant licenses to sell marketable articles elsewhere than at the public market.

HABEAS CORPUS sued out against Hughes, marshal, etc., by Bethune, who applied to be discharged from imprisonment,

under a warrant issued by the city council of Columbus for a violation of one of the market ordinances of that city which made it a penal offense, punishable by fine, for any person to contract for or vend any marketable articles before the public market opened, or at any place within the city limits during market hours except at the market-house, or to deliver such articles at any place save the market-house, during market hours. The legislative enactment, under authority of which this ordinance was passed, is contained in the opinion. The court refused to discharge the petitioner, who therefore assigns error.

James N. Bethune, in propria persona, and B. Y. Martin, for the plaintiff in error.

John Peabody, contra.

By Court, LUMPKIN, J. The only question which we propose to consider and decide is, Did the mayor and council of the city of Columbus have the power to pass an ordinance making it penal to sell such articles as are usually vended at a public city market at any other place, within certain hours, than at the market?

By the third section of the act of 1858, it is declared that "the mayor and council of the city of Columbus shall have the power to establish and keep up one or more public markets in said city for the sale of poultry, eggs, butter, milk, fresh meats, and vegetables of any kind, and all other such articles as are usually vended at the city public market, and shall govern the same as such mayor and council shall deem necessary and proper; and may prescribe and enforce fines and penalties for a violation of the market laws and regulations. Provided, however, that said mayor and council may grant private licenses for the sale of marketable articles, or any of them, at a place or places in said city other than the public market, upon such terms, regulations, and control as the said mayor and council may adopt:" Pamphlet Acts 1858, 128.

It will be seen that the act contains only a broad grant "to establish and keep up a market" or markets at one or more public places in the city. It confers no power to prohibit the sale of marketable articles elsewhere than at the market-place.

Now, it is laid down expressly in *Grant on Corporations*, 176, and in *Mayor of Macelsfield v. Chapman*, 12 Mee. & W. 18, that the grant of a market does not of itself imply the power to exclude all persons from selling elsewhere market

able articles within market hours. And we find no power contravening this. Mr. Grant adds that "it may be taken for law that the king himself could not, at the present day, convey the right to enforce so great a restriction upon trade:" *Id.* Perhaps parliament in its omnipotence might. Whether our republican legislature has this power, it is unnecessary to decide. It is enough to know that they have not undertaken to exercise it in the present case.

And they will hesitate long before they will knowingly compel decent poor women and boys to attend at the market-place, to mingle with the rabble that often assemble there, in order to sell a few pounds of butter or a few vegetables; before they will coerce poor men who bring in poultry and eggs on their load of wood to wait for hours before they can return to their labors, remaining around the market exposed to the weather; or, indeed, before they will restrict any person, in this land of liberty, from selling his cotton, corn, wheat, beef, pork, chickens, or anything else when he pleases, where he pleases, and to whomsoever he pleases.

After the judgment of the court was pronounced in this case, my attention was called to the proviso in the statute authorizing the mayor and council to grant private licenses for the sale of marketable articles at places in said city other than the public market. It was supposed that the power was deducible by necessary implication from those words. This clause did not escape observation. It does not, it will be presumed, authorize a license to sell generally over the city, but at a particular place or places other than at the market-house; and therefore does not, by implication, authorize a general prohibition, such as that contained in the ordinance. A power like that under consideration should not depend upon doubtful implication—one which it is exceedingly questionable whether the legislature itself can exercise or delegate to others.

Again: it is insisted that as the power is given, not only to establish but to keep up a market, and as this cannot be done but by prohibiting sales elsewhere, the power to do this is necessarily included in the grant as indispensable to its exercise. Even this result would not justify the assumption of power not delegated. The most that could be said would be that the grant would prove unavailable. But it is not true in point of fact. And here lies the fundamental error of this whole doctrine. A market may be established in such a way as to induce most persons who vend articles to go there for

that purpose. It possesses inherent advantages over other places. Property sold in market is attended with certain incidents which do not attach to private sales. Besides, stalls and other conveniences might be furnished without expense to the producer. Even bounties and premiums may be awarded, so as to encourage both the quantity and good quality of the articles vended at the market. Individuals are compelled to hold out inducements to secure trade: why should not communities be required to do the same? Private persons coax trade to their doors; whereas municipal corporations force it to their market-places by penal enactments, levying a tax at the same time upon the producer to supply their treasury with revenue. Let the burden fall where it ought to fall—upon the consumer. In short, let anything and everything be done rather than restrict commerce, rather than force and imprison trades-people, to coerce them to submit to all kinds of discomfort and inconvenience, not to say loss, to gratify the selfishness or avarice or convenience of a favored few; to be taxed to support the pomp and parade of a few municipal lords.

The best feeling formerly subsisted in our country towns between the consumer and the producer; they were mutually respectful and friendly; the country people frequently contracting with the citizen consumer for weekly, or even winter or summer, or yearly supplies of certain edibles. Weights and measures were satisfactory, and prices remunerating. The wives, daughters, and boys of the small farmer were treated with the civility due to their sex and condition. But how changed under these anti-free-trade regulations. No wonder that irritation has taken the place of good feeling!

A convention of the people, called by the people, I would most respectfully suggest, is imperiously needed to impose additional restraints upon the powers of the legislature, now more unlimited, in the opinion of some of our ablest jurists, than those of the British parliament. Our honest, simple-hearted ancestors supposed that when they had guaranteed trial by jury, freedom of the press, and of religious worship, no more was needed. Our state constitution contains fewer safeguards, perhaps, than any other in the Union. The new states are far ahead of this, and most of the old states, in this respect. But times have changed. And well as our system has worked in days past, a bill of rights is demanded. The great fundamental principles of human rights should be put beyond the reach and control even of constitutional change by the legis-

lature. Let the sovereign people convene, and say to the law-making power, Thus far shalt thou go, and no further.

Excessive legislation—the vice of all free governments—is, perhaps, the fault of the state. Through haste, inadvertence, and other causes, case legislation and class legislation is to be found frequently upon our statute-book. Something should be done to arrest this evil. The dearest rights of the people are jeopardized.

A peaceable citizen, who discharges punctually all his public duties, and respects scrupulously the rights of others, should be left free and untrammelled as the air he breathes, in the pursuit of his business and happiness. Fetters are equally galling, whether imposed by one man or by a community; and I am not ashamed to confess that the best sympathies of my heart are, and always will be, interested for one who is, or may be, incarcerated, because, in the proud consciousness of a freeman, he claims the right to offer for sale, at any hour of the day, on the highway or in the streets, as interest or inclination may prompt him, any commodity he may possess, the traffic in which is not forbidden by the laws of the land.

Judgment reversed.

POWER TO ESTABLISH AND KEEP UP MARKET will enable a city to prohibit the sale of marketable articles elsewhere during market hours; but there is a conflict of authority upon this point: Note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 638. In *St. Louis v. Weber*, 44 Mo. 551, it was held that the city of St. Louis, under its charter authorizing it to “establish markets and market-places, and to regulate the vending of meat,” had power to provide by ordinance that no person, not being the lessee of a butcher’s stall, should sell or offer for sale in market or elsewhere any fresh meat in less quantities than one quarter; and the court refused to adopt the principles laid down in the principal case, and in *St. Paul v. Laidlow*, 2 Minn. 190, which, it was said, would render it impossible to keep up the market system. In *Badkins v. Robinson*, 53 Ga. 615, it was held that a market ordinance was authorized by the statute, and was therefore not obnoxious to the decision in the principal case.

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2. DEED MADE BY AGENT CANNOT BE ASSAILED FOR WANT OF AUTHORITY TO EXECUTE IT, where it is executed under general power of attorney, by which the agent is authorized "to make and execute conveyances," and where the purchase-money is received by the principal. *Id.*

3. LIABILITY OF PRINCIPAL OR AGENT FOR SELLING UNWHOLESOME PROVISIONS.—If provisions sold for consumption are unsound, and the seller, or those employed by him in preparing them for market, might have known it by the exercise of ordinary care and diligence, the principal is,

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both the rule of court and the statute to control the arbitration; for from the rule of court and the submission it will be concluded that the parties intended that the arbitrators should be guided in their proceedings by the statute, but that the award might be excepted to on the ground of "fraud, accident, or mistake." *S. O. R. R. Co. v. Moore*, 778.

2. **ARBITRATOR SHOULD NOT BE ALLOWED TO IMPROACH HIS AWARD** eight days after it has been rendered, *semble. Id.*
3. **COURT WILL SET ASIDE AWARD FOR MISTAKE OF LAW MADE BY ARBITRATORS** and appearing upon the face of the award. *Id.*
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ATTACHMENTS.

1. **WRIT OF ATTACHMENT IS ONLY EFFECTUAL TO CHANGE TITLE TO GOODS FROM TIME OF ITS LEVY.** *Taft v. Marlowe*, 610.
2. **LEVY OF WRIT OF ATTACHMENT MAY BE GOOD AS AGAINST DEFENDANT THEREIN**, and not as to third persons. This is not so from any difference in the legal requisites of a levy, but arises where certain acts of such defendant may constitute a waiver, from an agreement by him, or by way of estoppel. *Id.*
3. **ACTS HELD NOT TO CONSTITUTE LEVY OF WRIT OF ATTACHMENT.**—Writ of attachment being placed in sheriff's hands, he proceeded, in company with a sworn keeper, to levy it upon goods in defendant's store. On arriving at the store they found it locked, and the sheriff placed the keeper at the rear door, and himself stood near the front door, thus preventing any one from entering or departing from the store. While the sheriff was standing thus deliberating how to effect an entrance, defend-

ant filed his petition in insolvency, and procured an order from the court staying all proceedings at the suit of his creditors against him. Defendant and his attorney then informed the sheriff of this restraining order, but showed him no written evidence of it, whereupon he demanded of them the key to the store, which they gave him, and he entered and took possession of its contents. *Held*, that the levy had not been perfected before the restraining order was made. Before entering, the officer did not know what goods were in the store, he had made no note or memorandum of the levy, and in all probability did not consider that he had seized the goods. *Id.*

4. **LEVY UPON PERSONAL PROPERTY IS ACT OF TAKING POSSESSION OF, seizing, or attaching it, by the sheriff or other officer.** As against the defendant, no great strictness of form is necessary; the entering up of his property with his assent is sufficient. But it is too plain for argument that there can be no levy when the officer does not even know the subject of the levy. *Id.*
5. **INTOXICATING LIQUOR, HELD BY ONE WHO CLAIMS TO HOLD IT FOR LAWFUL PURPOSE, IS SUBJECT TO ATTACHMENT** for his debts, like other property, and may be sold for a lawful purpose, on an execution against him. And the officer who has attached it, in a suit against the owner, is not precluded, by the fact of its being intoxicating liquor, from justifying such attachment in an action of trover, brought by the owner against him. *Nutt v. Wheeler*, 316.
6. **DEBT DUE BY DRAWER OF ORDER CANNOT BE REACHED BY ATTACHMENT** issued by the creditors of the drawer after delivery and presentation of the order. *Wheatley v. Strobe*, 522.
7. **IT IS PERMISSIBLE, AS PART OF DEFENSE, for defendant in garnishment to show that there was a valid judgment against his creditor which he paid under the compulsion of a garnishment.** *Gunn v. Howell*, 484.
8. **GARNISHEE CANNOT AVAIL HIMSELF OF MERE IRREGULARITIES** in a suit against his creditor. *Id.*
9. **GARNISHEE CANNOT ASSAIL COLLATERALLY JUDGMENT ENTERED AGAINST HIS CREDITOR** upon the ground that it was voidable. *Id.*
10. **PARTY IS NOT DEPRIVED OF HIS PROTECTION AS GARNISHEE** from a second payment on account of mere irregularities in the original suit. *Id.*
11. **MAKER OF NEGOTIABLE NOTE CANNOT BE CHARGED AS GARNISHEE OF PAYEE**, so long as the note is still current as negotiable paper. *Basett v. Garthwaite*, 257.
12. **MAKER OF NEGOTIABLE NOTE CANNOT BE CHARGED AS GARNISHEE OF PAYEE OF NOTE** before its maturity, and he cannot be charged as such after the maturity of the note, unless it be affirmatively shown that at the time of serving the writ the note was the property of the payee. *Id.*
13. **ANSWER OF GARNISHEE IS NOT EVIDENCE** of the facts therein stated against intervenors in a contest between them and the garnishors. *Id.*
14. **WHERE ONE IS SOUGHT TO BE CHARGED AS GARNISHEE OF PAYEE OF PROMISSORY NOTE**, and a third party intervenes claiming property in the note, the presumption is that it came into the latter's possession before its maturity, and the plaintiff must show affirmatively not only that he did not acquire it before maturity, but that it was in fact the property of the payee at the time of the service of the writ of garnishment. *Id.*

15. WHEN ANSWERS OF GARNISHEE, ON HIS EXAMINATION ON OATH IN PROCEEDINGS BY ATTACHMENT, are satisfactory to the plaintiff, the judgment of the court may be taken thereon; but where his answers are not satisfactory to the plaintiff, an issue may be made up and tried by a jury as in other cases. *Adams v. Filer*, 410.
 16. WHERE PROPERTY IN HANDS OF GARNISHEE IS ADJUDGED TO BELONG TO DEFENDANT in the attachment proceedings, and the garnishee acts in good faith, the judgment is conclusive as between the plaintiff, the defendant, and the garnishee. *Id.*
 17. JUDGMENT AGAINST GARNISHEE, ADJUDGING PROPERTY IN HIS HANDS TO BELONG TO DEFENDANT in the attachment, does not conclude a third person, not a party to the proceedings, who claims title to the same property. *Id.*
 18. GARNISHEE DOES NOT PROTECT HIMSELF FROM LIABILITY TO THIRD PERSON claiming title to the property attached by merely notifying the latter of the pendency of the proceedings, but he is bound to request him to defend, and tender to him the conduct of the defense. *Id.*
 19. WHERE VENDOR, GARNISHED IN ATTACHMENT PROCEEDINGS TO WHICH HIS VENDOR IS NOT PARTY, fails to apprise the latter that the title acquired by purchase from him has been called in question, gives him no notice of the garnishee process, and does not invite or request him to defend such title, a judgment rendered against him in such garnishee proceedings is no defense or bar to an action brought against him by such vendor to recover the price of the property sold. *Id.*
 20. TROVER IS NOT MAINTAINABLE AGAINST OFFICER OR AUTHORIZED PERSON FOR MERE NEGLIGENCE TO TAKE PROPER CARE OF ATTACHED PERSONAL PROPERTY; neither will such neglect render him a trespasser from the beginning. *Nutt v. Wheeler*, 316.
 21. OWNER'S PROPER REMEDY FOR OFFICER'S NEGLIGENCE IN TAKING CARE OF PERSONAL PROPERTY WHILE UNDER ATTACHMENT is a special action on the case. *Id.*
 22. CONVERSION, AND EVIDENCE THEREOF.—A lawful taking is no conversion. So mere negligence of officer in taking care of attached personal property is no evidence of conversion. *Id.*
 23. VEXATIOUS ATTACHMENT.—Debtor who comes into court to complain against his creditor, for injuriously suing out an attachment against him, must come with clean hands, and juries may well require clear and full proof that the creditor has violated the law, when the complaining debtor is, in the first instance, guilty of fraud or wrong. *Reed v. Samuels*, 253.
 24. WHERE ATTACHMENT IS SIMPLY WRONGFULLY SUED OUT, ONLY ACTUAL DAMAGES CAN BE RECOVERED; where it is sued out maliciously and with intention to harass and injure the defendant, exemplary damages may be awarded. *Id.*
- See ATTORNEY AND CLIENT, 3; BANKRUPTCY AND INSOLVENCY, 2, 5, 6; EQUITY, 9; PARTNERSHIP, 4, 10; SHERIFFS; WITNESSES, 2.

ATTORNEY AND CLIENT.

1. COMMUNICATIONS TO ATTORNEY BY ONE NOT INTERESTED IN SUIT ARE NOT PRIVILEGED, though the communicator be a nominal party, and disclose facts in regard to the suit. *Allen v. Harrison*, 202.

2. **ATTORNEY IS NOT PERMITTED TO DISCLOSE CONFIDENTIAL COMMUNICATIONS OF CLIENT;** but if he acquires information apart from or independent of such source, he is not protected from disclosing it. *Hunter v. Watson*, 543.
3. **CLIENT HAS NO RIGHT TO INTEREST IN FUNDS COLLECTED BY HIS ATTORNEY,** who was subsequently garnished, unless a previous demand has been made upon him. *Gunn v. Howell*, 484.
See EQUITY, 5.

AWARD.

See ARBITRATION AND AWARD.

BAILMENTS.

1. **EFFECT OF EXCHANGING PLEDGE FOR OTHER PROPERTY.**—Where a debtor leaves property with his creditor as security for a loan, with directions to sell it, deduct his debt, and pay the balance to the debtor, and the creditor, instead of doing so, exchanges it for other property, the property got by the exchange does not necessarily belong to the creditor, nor is it necessarily liable to attachment for the payment of his debts. The right of property is determined by the debtor's ratification or repudiation of the contract of exchange. *Strong v. Adams*, 305.
2. **BAILMENT OF PROPERTY WITH POWER OF SALE IS PERSONAL TRUST TO BAILEE.** *Id.*
3. **DEBTOR MAY REPUDIATE HIS CREDITOR'S EXCHANGE OF PLEDGED PROPERTY** by bringing an action, within a reasonable time, to recover the original property pledged by him to secure his debt. *Id.*
4. **DEBTOR MAY RATIFY HIS CREDITOR'S EXCHANGE OF PLEDGED PROPERTY** by bringing an action, within a reasonable time, to recover the property got by the exchange, and against one who has attached it as the creditor's property, unless there is evidence inconsistent with that of ratification. *Id.*
5. **TRESPASS IN CASES OF BAILMENT.**—Unless the bailee has the absolute right to retain bailed property for a definite time, trespass may be brought against a wrong-doer to the property, either in the name of the bailor or the bailee. *Per Redfield, C. J. Id.*
6. **BAILEE PLEDGING ANOTHER'S PROPERTY WITHOUT AUTHORITY IS GUILTY OF CONVERSION;** and both bailee and pledgee are liable in trover, whether the pledgee knew the real state of the title or not. *Thrall v. Lathrop*, 306.
7. **MEASURE OF DAMAGES WHERE BAILEE PLEDGES ANOTHER'S PROPERTY** is the value of the property at the time of the conversion. *Id.*

BANKRUPTCY AND INSOLVENCY.

1. **UPON FILING OF PETITION IN INSOLVENCY,** it is the duty of the court to make an order that all proceedings against the debtor be stayed. This order takes effect from the making of it; it does not have to be served upon the sheriff or a creditor to give it effect. *Taft v. Manlove*, 610.
2. **UPON FILING OF PETITION IN INSOLVENCY,** judicial control and dominion of the insolvent's estate is transferred to the court, and after this transfer a creditor cannot seize or interfere with it. *Id.*

3. **ENGLISH RULE IS, THAT FOREIGN ASSIGNEE** under a bankrupt law can sue as if he were an assignee under the law of England. *Upton v. Hubbard*, 670.
4. **AMERICAN RULE IS, TO CLASS FOREIGN ASSIGNEES** with foreign executors, administrators, guardians, etc., who, having title, right, or power, by mere operation of law, have it co-extensive only with the sovereignty of the state which gives it. Connecticut statute of 1854 has not changed this rule, nor does it authorize foreign assignees to sue in their own names by way of interpleader or otherwise. *Id.*
5. **ALTHOUGH FOREIGN ASSIGNEE MAY BE ALLOWED TO SUE IN HIS OWN NAME** in the courts of Connecticut as a mere act of courtesy, when there is no adverse interest to be affected, yet it will never be allowed for the purpose of defeating creditors, no matter where they reside, and especially if their attachments precede the assignment. *Id.*
6. **ATTACHING CREDITORS WHO HAVE ACQUIRED VALID LIEN** in Connecticut, upon a debt due a Massachusetts insolvent, may enforce their lien by prosecuting their claims to judgment and execution, notwithstanding the subsequent discharge of the insolvent under the bankrupt law of Massachusetts. *Id.*
7. **QUALIFIED JUDGMENT MAY BE HAD** and execution issue against property attached by creditors in Connecticut, even if a personal judgment against a foreign insolvent is prevented by his discharge under bankrupt proceedings instituted in another state. *Id.*

See ATTACHMENTS, 3; EXECUTORS AND ADMINISTRATORS, 10.

BANKS AND BANKING.

1. **BANKING-HOUSE MAY PRESCRIBE REASONABLE RULES AND HOURS OF BUSINESS**, within which its peculiar business with the public shall be done; but the reception or delivery of packages is not a matter peculiar to the banking business, and a bank has no right to declare that it will not receive packages from a common carrier after what it pleases to call "banking hours," and thereby thrust upon him a further continuance of his extraordinary responsibility. *Marshall v. Am. Exp. Co.*, 381.
2. **AUTHORITY OF TELLER OF BANK TO RECEIVE PACKAGES CONSIGNED TO IT** may be inferred from the nature and character of his office. The reception of such packages pertains as much to the appropriate functions of the teller as to those of the cashier. *Id.*
3. **RECEIVING LETTERS AND PACKAGES BY BANK IS NOT PART OF ITS ORDINARY BANKING BUSINESS** which is to be done over its counter within what are termed "banking hours," but is a description of business that is usually done after the general business with the public is closed for the day. *Id.*

See COMMON CARRIERS, 6-8, 9; NEGOTIABLE INSTRUMENTS, 4, 5; RECEIVERS; TAXATION, 13, 15.

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See EXECUTIONS, 8-10.

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See NEGOTIABLE INSTRUMENTS.

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See PLEADING AND PRACTICE, 27-29.

BONA FIDE PURCHASERS.

1. CREDITORS, AS SUCH, ARE NOT INCLUDED WITHIN PROVISIONS OF CALIFORNIA REGISTRATION ACT; but a judgment creditor purchasing at his own sale, without notice, is a *bona fide* purchaser within the act. *Hunter v. Watson*, 543.
2. PURCHASER OF LAND WITHOUT NOTICE, FROM ONE WHO PURCHASED WITH NOTICE of a prior unrecorded deed, acquires a good title if the old deed is still unrecorded at the time of the conveyance to the former. *Lee v. Oate*, 746.

See EMINENT DOMAIN, 5; MORTGAGES, 6; VENDOR AND VENDEE, 2, 3.

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See ATTACHMENTS, 22; BAILMENTS, 6, 7; TROVER.

COMMON CARRIERS.

1. RAILROAD COMPANY IS NOT LIABLE IN DAMAGES, AS COMMON CARRIER, to one who hires or charters cars absolutely, in case of injury to his property. The remedy of the latter must be on the contract of hire, and the implied undertaking of the company that the hired cars are substantial, and will be duly carried to their destination. *East Tenn. etc. R. R. Co. v. Whittle*, 741.
2. ON QUESTION OF NEGLIGENCE OF CARRIER, HE MAY SHOW THAT DELAY IN TRANSPORTATION had been consented to by the shipper before the commencement of the voyage. *Johnson v. Lightsey*, 450.
3. CARRIER MAY SHOW THAT IT WAS CUSTOMARY FOR TWO FLAT-BOATS laden with cotton to descend the river lashed together where cotton was damaged while being thus transported. *Id.*
4. COMMON CARRIER CONTRACTS TO CARRY GOODS ENTRUSTED TO HIM, and deliver them to the consignee, at the proper time and at the proper place, without loss or failure, except by the act of God or of the public enemy. And the consignor at the same time undertakes that there shall be a consignee, or some proper person, at the proper place, at the proper time, to receive the goods, or in default thereof, upon due notice, the liability of the carrier as such ceases. *Marshall v. Am. Exp. Co.*, 381.
5. WHERE COMMON CARRIER DELIVERS GOODS, OR OFFERS TO DELIVER THEM to the proper person, at the proper place, his liability as a common carrier is, from that moment, at an end, and the consignee has no power to prolong that liability, however inconvenient it may be for him to receive the goods. *Id.*
6. OFFER BY EXPRESS COMPANY TO DELIVER PACKAGES TO BANK AT HALF-PAST FIVE o'clock in the afternoon, at the city of Madison, in the month of August, before the closing of the bank building for the day, constitutes a tender equivalent to a delivery. *Id.*
7. BANK IS NOT EXCUSED FOR REFUSING TO RECEIVE PACKAGE from common carrier offering to deliver the same, by reason of the fact that the offer is made after banking hours, and that the vaults are locked and the cashier is gone home with the keys thereof. *Id.*
8. OFFER BY COMMON CARRIER TO DELIVER PACKAGES TO OFFICER OF CORPORATION to whom he usually delivered such packages in the usual course of business, is sufficient to discharge the carrier from his liability as such. Where, therefore, the messenger of an express company takes a package consigned to a bank to the banking-house, and there tenders it to the teller of the bank who usually received such packages from the company, such tender relieves the express company from further liability as a common carrier. *Id.*
9. COMMON CARRIER, AFTER HE MAKES PROPER TENDER OF GOODS TO CONSIGNOR, who refuses to receive them, holds them simply as a mandatary, and is then liable only for gross negligence. *Id.*

BILLS OF EXCEPTIONS.

See PLEADING AND PRACTICE, 27-29.

BONA FIDE PURCHASERS.

1. CREDITORS, AS SUCH, ARE NOT INCLUDED WITHIN PROVISIONS OF CALIFORNIA REGISTRATION ACT; but a judgment creditor purchasing at his own sale, without notice, is a *bona fide* purchaser within the act. *Hunter v. Watson*, 543.

2. PURCHASER OF LAND WITHOUT NOTICE, FROM ONE WHO PURCHASED WITH NOTICE of a prior unrecorded deed, acquires a good title if the old deed is still unrecorded at the time of the conveyance to the former. *Lee v. Otto*, 746.

See EMINENT DOMAIN, 5; MORTGAGES, 6; VENDOR AND VENDEE, 2, 3.

BONDS.

See SURETYSHIP; VENDOR AND VENDEE.

BRIDGES.

See WATERCOURSES, 12.

BURDEN OF PROOF.

See PAYMENT, 6; WATERCOURSES, 4; WITNESSES, 2.

CARRIERS.

See COMMON CARRIERS.

CASE.

See ATTACHMENTS, 21.

CATTLE.

See ANIMALS, 2.

CAVEAT EMPTOR.

See SALES, 7.

CHARACTER.

See CRIMINAL LAW, 6-8; SEDUCTION, 2, 3; WITNESSES, 6-8.

CHARTERS.

See CORPORATIONS, 6, 7, 12; TAXATION.

CHILD.

See PARENT AND CHILD; WILLS, 22, 23.

CIRCUMSTANTIAL EVIDENCE.

See EVIDENCE, 6-8.

CLIENTS.

See ATTORNEY AND CLIENTS.

CLOUD ON TITLE.

See EQUITY, 15-19.

COLLISIONS.

See HIGHWAYS, 2.

COMMISSION.

See ATTACHMENTS, 22; BAILMENTS, 6, 7; TROVER.

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9. COMMON CARRIER, AFTER HE MAKES PROPER TENDER OF GOODS TO CONSIGNEE, who refuses to receive them, holds them simply as a mandatary, and is then liable only for gross negligence. *Id.*

10. EVIDENCE OF HABIT AND CUSTOM OF BANK TO RECEIVE PACKAGES after usual banking hours, and before the final closing of the bank building for the day, is properly admitted, for the purpose of enabling the jury to determine whether or not a tender of a package to the bank, by a common carrier, was made at a proper time, where the action is brought by the consignor of such package against the carrier to recover for its loss, and the latter defends on the ground that he offered to deliver the package to the bank, which refused to receive the same. *Id.*

See BANKS AND BANKING, 1, 2; FERRIES; RAILROADS; TELEGRAPH COMPANIES; WITNESSES, 4.

COMMON LAW.

See ANIMALS, 2; CO TENANCY, 6, 7; LIENS, 8, 9; TREMPASS, 7; WATERCOURSES, 1.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE; MARRIED WOMEN.

COMPLAINTS.

See PLEADING AND PRACTICE, 4

CONDEMNATION.

See EMINENT DOMAIN.

CONDITIONS.

See CORPORATIONS, 8, 14-16; VENDOR AND VENDEE, 11; WILLS.

CONFESSION.

See JUDGMENTS, 20, 24.

CONFIRMATION.

See CO TENANCY, 15; JUDICIAL SALES.

CONFLICT OF LAWS.

1. JUST "COMITY" REQUIRES THAT CONTRACT SHOULD BE EXPOUNDED and its obligations ascertained according to the law of the country where it is made. *Donald v. Hewitt*, 431.
2. WHERE CREDITORS AGREE TO TAKE NOTE FOR DEBT, IF INDORSED by a certain person residing in another state, and in pursuance thereof a note is drawn, dated at Columbus, Georgia, and is carried by the makers to Alabama, where such party indorses it, and returns it to the makers, who deliver it to the creditor in Georgia, such indorsement is a Georgia, and not an Alabama, contract. *Stanford v. Pruett*, 734.

See INTEREST; HUSBAND AND WIFE, 21-28; PLEADING AND PRACTICE, 2.

CONSIDERATION.

See CONTRACTS, 2; FRAUD, 2; JUDICIAL SALES, 1; PLEADING AND PRACTICE, 9; SALES, 8.

CONSTITUTIONAL LAW.

See STATUTES; TAXATION.

CONSTRUCTION.

See CONFLICT OF LAWS, 1; EQUITY, 2; FERRIES, 2; STATUTES, 3; WILLS.

CONTRACTS.

1. WRITTEN CONTRACT IS CONSIDERED DEFINITIVE AGREEMENT OF PARTIES, and parol conversations and understandings are all merged in it. *Conner v. Clark*, 529.
 2. PROMISE TO BEAR PART OF EXPENSE OF SUIT, made by one not a party to it, and in no way interested in its result, is without consideration and void. *Whitson v. Fowlkes*, 184.
 3. PAROL EVIDENCE IS ADMISSIBLE IN EQUITY TO VARY AND REFORM WRITTEN CONTRACTS AND INSTRUMENTS upon the ground of accident, mistake, or fraud, so as to make them conform to the intention of the parties. *Dunham v. Chatham*, 228.
 4. ORAL TESTIMONY IS NOT ADMISSIBLE to vary the terms of a written contract. *Martin v. P. etc. Co.*, 713.
 5. TIME IS NOT OF ESSENCE OF CONTRACT, UNLESS THERE ARE WORDS clearly showing such an intention. *Taylor v. Baldwin*, 736.
 6. WRITTEN INSTRUMENT IS CONCLUSIVE EVIDENCE OF AGREEMENT between parties thereto, where it was voluntarily made without fraud or mistake; and prior parol declarations cannot be admitted to change the legal liability created by it. *Kearly v. Duncan*, 180.
- See AGENCY; ASSIGNMENT OF CONTRACTS; BAILMENTS; CONFLICT OF LAWS; CORPORATIONS; DEEDS; FRAUD; HUSBAND AND WIFE; INTEREST; INTERVENTION; LIENS; MARRIED WOMEN; MORTGAGES; NEGOTIABLE INSTRUMENTS; REWARDS; SOVEREIGNTY; TAXATION; TELEGRAPH COMPANIES; VENDOR AND VENDEE.

CONTRIBUTION.

- IN ACTION FOR CONTRIBUTION BETWEEN TWO PARTIES, the record of the former trial, which showed that judgment had been rendered against the two jointly, and that one party had paid, will not be held sufficient to establish the relative liabilities of the defendants *inter sese*. *Byington v. Cook*, 491.

CONTRIBUTORY NEGLIGENCE.

See RAILROADS, 8.

CORPORATIONS.

1. ORAL TESTIMONY IS INADMISSIBLE TO VARY the terms of a subscription to railway stock, unless it tend to show fraud or mistake. *Martin v. P. etc. R. R. Co.*, 713.
2. ORAL TESTIMONY IS INADMISSIBLE TO PROVE INDUCEMENTS AND CIRCUMSTANCES which led to subscription for railway stock, and the understanding of subscribers when they subscribed for it, unless such testimony goes to establish fraud or mistake. *Id.*
3. INDIVIDUAL SUBSCRIBER FOR RAILWAY STOCK SUBSCRIBES WITH DISTINCT KNOWLEDGE AND UNDERSTANDING that the terms of the contract may be varied or totally altered at any time by a concurrence between the majority of his associates and the legislature, so that the corporation may

be authorized to embark in new enterprises, wholly and essentially different from those originally contemplated; and this may be done without the subscriber's assent, and in defiance of his dissent. His only remedy is to dissent and withdraw from the association. *Id.*

4. **UTMOST GOOD FAITH SHOULD BE RIGIDLY ENFORCED** between chartered corporations and their stockholders; but such corporations are to be held to a strict accountability and to the careful observance of the limitations of their chartered powers. *Id.*
5. **INDIVIDUAL SHAREHOLDER OF RAILWAY STOCK IS BOUND** by action of board of stockholders, so long as such acts are regularly passed, and within the scope of the corporation's legitimate powers, and limited to the promotion of the particular enterprise contemplated in the original charter of incorporation; and the stockholders' dissent, even in the most formal manner, will not relieve him from his duty and obligation. *Id.*
6. **WHENEVER CORPORATION ACCEPTS MATERIAL ALTERATION** of its charter from legislature, by regular action of stockholders in general meeting, duly organized, the act is binding upon each individual member, unless he shall expressly dissent therefrom before any debts are contracted or rights inure to third parties in carrying out the new designs or enterprise. *Id.*
7. **IN DEFENSE TO ACTION AGAINST STOCKHOLDER UNDER ALTERED CHARTER**, the defendant must affirmatively show that he dissented from the alteration in a reasonable time, and before any debts had been contracted or rights accrued to third parties under such alteration. It is not incumbent upon the corporation to show the stockholder's assent in order to maintain the action. *Id.*
8. **SUBSCRIBER FOR RAILWAY STOCK WILL BE ABSOLVED FROM HIS OBLIGATION** to pay therefor, unless the corporation has strictly complied with conditions precedent. Such is the case where, in the body of the subscription, there is a stipulation for a particular enterprise, as for the building of the road to a particular place, or for its location upon a specified route. Such a stipulation forms a condition precedent, and must be complied with. *Id.*
9. **AGREEMENTS TO TAKE STOCK IN RAILROAD CORPORATION, AND PRIVATE CONTRACTS**, are not governed by the same rules. *Id.*
10. **CORPORATIONS ARE BOUND BY ACTS OF MAJORITY**, when those acts are conformable to the articles of the constitution. *Id.*
11. **DIFFERENCE BETWEEN SIMPLE PARTNERSHIP AND INCORPORATED ASSOCIATION**, where the company undertakes to depart from or add to the original object or design, as set forth in the articles of association or charter of incorporation, is that in the former case the assent of the individual member is not to be assumed: it is to be affirmatively established by competent proof; in the latter, his assent will be presumed, unless he affirmatively proves his dissent. *Id.*
12. **SHAREHOLDER IN RAILWAY CORPORATION WILL BE PRESUMED TO HAVE ASSENTED TO ACTION** of the stockholders in unanimously accepting a legislative alteration of the charter, in the absence of proof to the contrary; and especially will this presumption be proper where the company has contracted debts to a large amount before any objection is made. *Id.*
13. **PROOF OF CORPORATE EXISTENCE**.—The general rule is that the existence of a corporation may be proved by producing its charter, and showing

acts of user under it, but this rule has no application to a corporation formed under the provisions of a general statute requiring certain acts to be performed before the corporation can be considered in esse, or its transactions possess any validity. *Mohamane Hill Mining Co. v. Woodbury*, 658.

14. **EXISTENCE OF CORPORATION FORMED UNDER PROVISIONS OF GENERAL STATUTE** must be proved by showing at least a substantial compliance with the requirements of the statute. *Id.*
15. **COMPLIANCE WITH STATUTE TO EFFECT INCORPORATION.**—In effecting a corporate existence under a general statute, there is a broad distinction between such acts as are declared to be necessary steps in the process of incorporation and such acts as are required of the individual seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. The former must be strictly observed, or the corporate existence may be successfully impeached in any proceeding in which it is questioned. In respect to the latter, the corporation is responsible only to the government, in a direct proceeding to forfeit its charter. *Id.*
16. **CORPORATE EXISTENCE.**—The filing of a certified copy of articles of incorporation with the secretary of state is not necessary in order to acquire a corporate existence for certain purposes. When the articles are filed with the county clerk, as far as individuals are concerned, the corporation acquires a valid legal existence. The filing of the certified copy with the secretary is exclusively a matter between the corporation and the state, for which the latter alone has a remedy by a direct proceeding. *Id.*
17. **CORPORATIONS, LIKE NATURAL PERSONS, ARE CAPABLE OF MAKING CONTRACTS**, even with the power that creates them. *State v. Bank of Smyrna*, 699.
18. **CORPORATION HAVING CAPACITY TO TAKE AND HOLD PROPERTY MAY TAKE AND HOLD IT UPON TRUST** to the same extent as a private person. If the trust be repugnant to or inconsistent with the purposes for which the corporation was formed, this may be a ground for not compelling it to execute it, but it will not in any wise impair the trust, but will simply require a new trustee to be substituted by the proper court. *Bell County v. Alexander*, 268.
19. **RESIDENCE OF CORPORATORS DOES NOT INFLUENCE** the question as to the location or residence of the corporation to which they belong. *Connecticut etc. R. R. Co. v. Cooper*, 319.
20. **MUNICIPAL CORPORATION IS NOT LIABLE FOR NON-ACTION OF ITS OFFICERS**, when such non-action is contrary to the will of the corporation, as expressed in its ordinances. *Peck v. City of Austin*, 261.
21. **CONTRACT BY MUNICIPAL CORPORATION HAVING PERPETUAL CHARTER** to pay a certain sum in town stock, bearing interest, and that "said stock shall be redeemable at the pleasure of the corporation after" a day fixed, is a valid contract, and gives the corporation the right indefinitely to postpone payment of the principal sum after the day fixed. *Blanding v. Columbia*, 102.
22. **STATUTE EMPOWERING CITY TO ESTABLISH AND KEEP UP MARKET** does not authorize the city to prohibit persons from selling elsewhere marketable articles within the market hours, though the statute contains a proviso

authorizing the city to grant licenses to sell marketable articles elsewhere than at the public market. *Bethune v. Hughes*, 789.

See COUNTIES; HIGHWAYS; LICENSES, 6; RAILROADS; TAXATION.

COSTS.

See CRIMINAL LAW, 1; INFUNCTIONS, 2.

CO-TENANCY.

1. **GRANTERS ARE TENANTS IN COMMON**, where the deeds under which they claim cover the same land, bear the same date, are founded upon surveys recorded and certified on the same day, and purport to have been made upon warrants issued on the same day. *Young v. De Bruhl*, 127.
2. **CONTRACT OF LEASE BY ONE TENANT IN COMMON** does not bind his co-tenants unless they concur. *Vaughan v. Gravena*, 163.
3. **EQUITY PROHIBITS PURCHASE BY PARTIES PLACED IN SITUATION OF TRUST** or confidence with respect to the subject of the purchase. This rule applies to purchases of outstanding titles and incumbrances by joint tenants, and in some instances by tenants in common. *Brittin v. Handy*, 497.
4. **WHERE JOINT TENANT OR TENANT IN COMMON** purchases an outstanding title, which is adverse to the common title, his purchase is not void, but the co-tenant must elect within a reasonable time to avail himself of the adverse title so purchased, and offer to contribute his due proportion of money expended in such purchase. *Id.*
5. **PURCHASE OF CO-TENANT'S INTEREST IN LAND VALID.**—Where vendor purchases the interest in land of one of the co-tenants, and there remains a balance of the purchase-money due him, secured by a note executed to him by both tenants in common, upon which they are jointly and severally liable, and there being no property out of which the vendor could secure his debt but the land, he brings suit upon the note, obtains judgment, and becomes the purchaser at execution sale, his purchase of his co-tenant's interest is valid. *Id.*
6. **TENANT IN COMMON CANNOT MAINTAIN ACTION AT COMMON LAW AGAINST CO-TENANT**, in sole possession of the premises, to recover a share of the rents and profits, unless the defendant occupies the premises as bailiff or receiver of the plaintiff's interest, by agreement; and this rule prevails in California, since the statute of 4 & 5 Anne, c. 16, has not been adopted. A complaint, therefore, in the form of a common-law action of account, is fatally defective if it does not allege such occupation. *Pice v. Columbat*, 550.
7. **OCCUPATION OF TENANT IN COMMON IS, AT COMMON LAW, BUT EXERCISE OF LEGAL RIGHT**, so long as he does not exclude his co-tenant. His cultivation and improvement are made at his own risk; if they result in loss, he cannot call upon his co-tenant for contribution; and if they produce a profit, his co-tenant is not entitled to share in them. The co-tenant can, at any moment, enter into equal enjoyment of his possession, and his neglect to do so may be regarded as an assent to the sole occupation of the other. *Id.*
8. **ACTION, IN FORM OF EQUITY SUIT, WILL NOT LIE BY TENANT IN COMMON AGAINST CO-TENANT**, in sole possession of the premises, to recover a share

of the profits resulting from the labor and money of the defendant, when the plaintiff has expended neither, and has never claimed possession, and never been liable for contribution in case of loss. *Id.*

9. REMEDY BY ACTION OF ACCOUNT BETWEEN CO-TENANTS, GIVEN BY RHODE ISLAND STATUTE, R. S., c. 209, sec. 1, is not confined to the rents and profits of the joint estate actually received by one co-tenant in a greater share or proportion than by the other. And where one of the co-owners of a joint estate consisting of a manufacturing establishment has had the exclusive use thereof, the rentable value of the excluded co-owner's share of the estate is the fair test of the value of the use of his interest, irrespective of the profits made or the losses suffered by the occupying co-tenant during his exclusive occupancy. *Knowles v. Harris*, 77.

10. CO-TENANT OF LAND ABSENT FROM STATE MAY BE MADE PARTY DEFENDANT in suit by administrator of deceased co-tenant, even assuming that had he been within the state he must have been joined as complainant. *Parkman's Adm'r v. Aicardi*, 457.

11. TENANT IN COMMON CAN NEITHER SELL NOR INCUMBER any part of the estate by metes and bounds, so as to prevent such division or distribution as would give the other co-tenants an unincumbered title to the part sold or incumbered. This rule applies to a passway held in co-tenancy. *Marshall v. Trumbull*, 667.

12. ONLY WAY IN WHICH CO-TENANT CAN RETAIN any portion of or a right in a passway held in co-tenancy, after conveying away a portion of it, is to convey not his whole undivided half, but some aliquot part or portion of it. Thus reserving in himself a right in the whole not inconsistent with the rights of his co-tenants while it remained common property. *Id.*

13. ON PARTITION OF LANDS, IMPROVEMENTS ARE NOT ALLOWED FOR ACCORDING TO THEIR COST, but according to the value which they have imparted to the premises. *Moore v. Williamson*, 93.

14. PARTY DISSATISFIED WITH APPRAISEMENT BY COMMISSIONERS IN PARTITION of land to be assigned to another may bring the property to a sale by securing and making a bid, offering a material advance in price over such appraised value. *Id.*

15. AFTER CONFIRMATION OF PARTITION SALE AT WHICH PLAINTIFF BECAME PURCHASER, the biddings will not be opened upon the offer by one of the defendants of double the price bid by the purchaser on the ground that notice of the suit was given by publication, and that some of the defendants were minors. *Houston v. Aycock*, 131.

See DEEDS, 4.

COUNTIES.

1. COUNTY, BEING EMPOWERED TO TAKE, HOLD, AND DISPOSE OF PROPERTY for municipal purposes, and such other purposes as subserve the public good, although a public corporation, has the same capacity in this respect and to this extent as a private corporation, to take and hold property in trust. *Bell County v. Alexander*, 268.

2. COUNTY HAS CAPACITY TO ACQUIRE ESTATE IN LANDS BY GRANT OR DEVISE. *Id.*

3. IN CONVEYANCE IN TRUST TO COUNTY "FOR BENEFIT OF PUBLIC SCHOOLS," the objects of the charity are sufficiently certain and definite. *Id.*

4. **COUNTIES HAVE CAPACITY TO RECEIVE BEQUEST OF LANDS IN TRUST FOR BENEFIT OF PUBLIC SCHOOLS.** The law enjoins upon them the duty of maintaining and conducting a system of schools; and the purposes of the trust being thus germane to the objects of the county's existence, and relating to matters which will promote and aid and perfect those objects, there is no legal impediment to the corporation's taking the devise upon trust. *Id.*

COUNTY COURTS.

See EXECUTORS AND ADMINISTRATORS, 6, 7.

CREDITORS' BILLS.

See EQUITY.

CRIMINAL LAW.

1. **PRISONER'S NOTE TAKEN BY JAILER IN PAYMENT OF FINE AND COSTS** is, in effect, so much money in his hands, and he becomes at once debtor for the fine and costs. *St. Albans Bank v. Dillon*, 295.
2. **COURT HAS RIGHT TO GIVE TO JURY FURTHER OR EXPLANATORY CHARGES**, in a case where counsel have voluntarily absented themselves from the court-room, if the prisoner be present. *Collins v. State*, 426.
3. **INSTRUCTION THAT DEFENDANT WAS JUSTIFIED IN SHOOTING AT PROSECUTOR**, after prosecutor had attempted to shoot him, is properly refused, since it assumes that the prosecutor had attempted to shoot him, and because this fact alone is not a justification of the shooting, since the prosecutor may have abandoned the combat after attempting to shoot. *Allen v. State*, 760.
4. **TO CONSTITUTE JUSTIFICATION FOR SHOOTING AT ANOTHER**, something more must appear than the single fact that the defendant did not shoot until an attempt had been first made to shoot him. *Id.*
5. **WHETHER OR NOT GUN IS LOADED, AND HOW LOADED, IS VERY MATERIAL**, on the question of intent, upon an indictment under a statute against shooting at another. *Id.*
6. **PROOF IN CASE OF HOMICIDE, THAT DECEASED WAS ESCAPED CONVICT**, offered in evidence to show his bad character, is irrelevant and inadmissible. *Dupree v. State*, 422.
7. **PARTICULAR ACTS OF MISCONDUCT ON PART OF DECEASED**, and offenses against the law committed by him, but not connected with the case, are inadmissible to prove bad character. *Id.*
8. **CHARACTER OF PRISONER FOR PEACEFUL DISPOSITION AND HABITS** is competent proof for him. *Id.*
9. **THREATS PROVED TO HAVE BEEN MADE BUT SHORT TIME BEFORE COMMISSION OF HOMICIDE**, which are indicative of an angry and revengeful spirit, are admissible in evidence for the prisoner. *Id.*
10. **IT IS NOT ERROR TO REFUSE TO INSTRUCT JURY** "that if they believed from the evidence there was a reasonable belief in his [the prisoner's] mind of some great personal injury or bodily harm about to be committed on him by the deceased, and that there was reasonable ground on his part to believe that he was in danger of great bodily harm from the deceased, whether it actually existed or not, the killing, under the circumstances would be excusable;" nor is it error to give the above instructions with a qualification that the danger must be imminent or threatening. *Id.*

11. **DESCRIPTION OF MONEY IN INDICTMENT.**—In an indictment for larceny, money should be described as so many pieces current gold or silver coin of the country, of a particular denomination, according to the facts. The species of coin must be specified. A description as "three thousand dollars lawful money of the United States" is not sufficient. *People v. Ball*, 631.
12. **PERSON IS GUILTY OF RECEIVING STOLEN GOODS** if he takes them under circumstances that would put a reasonable man of ordinary observation on his guard. *Collins v. State*, 426.
- See AGENCY, 3; EVIDENCE, 2-4, 6-8.

CROPS.

See RAILROADS, 16.

CRUELTY.

See MARRIAGE AND DIVORCE, 4-7.

CUSTOMS.

See COMMON CARRIERS, 3, 10

DAMAGES.

1. **PLAINTIFF, TO PROVE HIS DAMAGES, MAY GIVE EVIDENCE OF PROFITS WHICH HE MIGHT HAVE MADE** upon goods that he could have manufactured, and which he was prevented from manufacturing by the act of the defendant, in raising a dam below the plaintiff's mill on the same stream, by reason of which erection the water was made to flow back and impede the operation of such mill. *Simmons v. Brown*, 66.
2. **EVIDENCE OF LOSS OF PROFITS IS USUALLY ADMITTED** wherever such loss is the natural and necessary result of the act charged. *Id.*
3. **PUNITIVE DAMAGES MAY BE AWARDED IN CASE FOR OBSTRUCTING PUBLIC WAY** if the act be willful or the intent malicious. *Windham v. Rhame*, 116.
- See ATTACHMENTS, 24; BAILMENTS, 7; CO-TENANCY, 9; NUISANCES, 6; PLEADING AND PRACTICE, 15; RAILROADS, 4; STATUTE OF LIMITATIONS, 3; TELEGRAPH COMPANIES, 2, 3; TRESPASS; TROVER.

DAMS.

See DAMAGES, 1; PLEADING AND PRACTICE, 2; WATERCOURSES, 8-10.

DEATH.

See CO-TENANCY, 10; DEEDS, 1; EXECUTIONS, 21, 22; MISTAKE; PARTNERSHIP, 2, 5.

DECLARATIONS.

See EVIDENCE; HUSBAND AND WIFE, 18; NUISANCES, 5, 6; REFERREES; WITNESSES, 10.

DECREES.

See JUDGMENTS.

DEEDS.

1. DEED TO ONE WHO IS DEAD AT TIME OF EXECUTION IS NULLITY. *Hunter v. Watson*, 543.
 2. WORD "HEIRS" IN CONVEYANCE IS NOT WORD OF PURCHASE, carrying title to the heirs, but only qualifying the title of the grantee. *Id.*
 3. GRANTER'S FAILURE TO RECORD DEED DOES NOT ABSOLUTELY AVOID IT as to third persons, under the California registration act. The failure to record only protects *bona fide* purchasers for a valuable consideration. *Id.*
 4. RESERVATION OR EXCEPTION IN DEED VOID.—A and B were co-tenants of a passway; A sold his portion thereof, and in the deed attempted to reserve to himself the right to pass and repass through said passway into and upon adjoining land: *Held*, that such reservation or exception was void, and that the other co-tenant might at all times so treat it. *Marshall v. Trumbull*, 667.
- See AGENCY, 2; BONA FIDE PURCHASERS, 2; CO-TENANCY, 1; FRAUD, 2; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE; MARRIED WOMEN; MISTAKE; MORTGAGES; NOTICE; TRUSTS AND TRUSTEES; WILLS, 2.

DEFAULT.

See JUDGMENTS; PLEADING AND PRACTICE, 4, 14.

DEFINITIONS.

See LINKKEEPERS, 1; LIONHUB, 1.

DELIVERY.

See COMMON CARRIERS, 4-10.

DEMAND.

See ESTATES OF DECEDENTS.

DEMURRER.

See EQUITY, 20.

DEPOSITIONS.

See EVIDENCE, 5.

DEPUTIES.

See SHERIFFS, 3, 4.

DESCRIPTION.

See CRIMINAL LAW, 11.

DEVICES.

See WILLS.

DISCOVERY.

See EQUITY, 13.

DISMISSAL.

See EQUITY, 20; JUDGMENTS, 2.

DISSOLUTION.

See PARTNERSHIP, 13.

DISTRICT COURTS.

See PROBATE COURTS; WILLS, 2.

DITCHES.

See RAILROADS, 5; WATERCOURSES, 8.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICILE.

See CORPORATIONS, 19; HUSBAND AND WIFE, 21-23; RAILROADS, 17-19.

DRAFTS.

See NEGOTIABLE INSTRUMENTS.

DURESS.

See HUSBAND AND WIFE, 19, 20.

EASEMENTS.

See CO-TENANCY, 11, 12; DEEDS, 4.

EJECTMENT.

- 1. IN ACTION OF EJECTMENT, PERFECT EQUITABLE DEFENSE, UNITED WITH POSSESSION, is in California equivalent to a legal title. *Morrison v. Wilson*, 593.**
- 2. PARTY WHO HAS NO RIGHTS, either as mortgagee or assignee, cannot set up an outstanding mortgage, in favor of some third person, to defeat the title of a plaintiff in ejectment who is a second mortgagor; and it can make no difference whether the party attempting to set up such mortgage has such interest in the land as will enable him to redeem, and thus acquire the rights of an assignee of the mortgage. *Savage v. Dooley*, 680.**
- 3. DEFENDANT IN EJECTMENT ENTERING ON LAND SUED FOR, under plaintiff's lessor, whether by purchase, gift, or lease, cannot dispute the title under which he entered. *Williams v. Cash*, 739.**
- 4. IF DEFENDANT IN EJECTMENT SETS UP DEFENSE HOSTILE TO TITLE UNDER WHICH HE ENTERED, he cannot afterward claim to be a tenant at will and entitled to notice to quit before suit. *Id.***

See EXECUTORS AND ADMINISTRATORS, 9.

EMINENT DOMAIN.

- 1. PRIVATE PROPERTY CANNOT BE TAKEN FOR PUBLIC USE without first paying or securing to the owner just compensation therefor, as a condition precedent to title or the right of possession by the public or its agent. *Bensley v. M. L. W. Co.*, 575.**
- 2. PARTY PROCURING ORDER FOR CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USE cannot, without complying at all with the requirements of the proceeding, which are of service to the owner, lay by for four years, and then without notice give effect to the previous and initiatory acts through which he derails his title. *Id.***

ESTOPPEL.

1. PARTY IS NOT ESTOPPED BY ADMISSION MADE THROUGH INNOCENT MISTAKE OF FACTS in material points and in ignorance of his rights. *Thrall v. Lathrop*, 306.
 2. IF PARTY MAKES ADMISSIONS IN INVENTORY IN PROBATE PROCEEDING as to certain property, this does not act as an estoppel *in pais*; and to constitute it an estoppel *in pais*, the admission it contains must have been acted on by others, who would be prejudiced in consequence were the party who made the admission permitted to retract it. *Little v. Birdwell*, 242.
 3. WOMAN ACTING AS GUARDIAN, AND INSERTING HER OWN PROPERTY BY MISTAKE in her ward's inventory, is not estopped, in equity, from proving title to the same in herself. *Dunham v. Chatham*, 228.
- See EJECTMENT, 3; LICENSES, 5; MARRIED WOMEN: TRUSTS AND TRUSTEES, 1.

EVIDENCE.

1. DECLARATIONS OF PERSON INJURED WHEN NO ONE IS PRESENT ARE NOT EVIDENCE to show the manner in which the injury occurred, however nearly contemporaneous with the occurrence. *State v. Davidson*, 312.
2. DECLARATIONS OF PARTY THAT DEFENDANT ROBBED HIM, though made but shortly after the crime, if any, was committed, are not a part of the *res gestæ*, and are inadmissible to prove the *corpus delicti*. *Id.*
3. WRITTEN STATEMENT OF PERSON ALIVE AT TIME OF TRIAL, MADE AT CORONER'S INQUEST, will not be received in evidence. *Dupree v. State*, 422.
4. WRITTEN STATEMENT OF WITNESS MADE AT CORONER'S INQUEST is admissible in evidence where witness has died since the inquest; but not merely because of emigration of the witness to another state. *Id.*
5. PAROL EVIDENCE CONSISTENT WITH WRITING TO WHICH IT RELATES IS ADMISSIBLE. *Evans v. Smith*, 751.
6. CIRCUMSTANCES HAVING NO DIRECT CONNECTION WITH CASE should not be admitted as evidence. *Dupree v. State*, 422.
7. CIRCUMSTANCES TENDING TO PROVE CORPUS DELICTI ONLY, and those tending to prove defendant's guilt only, should be separately presented to the jury and the effect of each stated, and it is error to instruct the jury that they may consider all the circumstances in the case together upon both questions. *State v. Davidson*, 312.
8. WHEN CORPUS DELICTI IS SHOWN BY CIRCUMSTANTIAL EVIDENCE, it must be so established as to exclude all uncertainty or doubts from the minds of the jury. *Id.*
9. ANSWER RESPONSIVE TO BILL IN EQUITY, AND DENYING CHARGES THEREIN, is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin v. Hammond*, 574.
10. STATUTE OF ANOTHER STATE CAN BE PROVED IN GEORGIA only by a certified copy. *Stanford v. Pruett*, 734.
11. WHERE EVIDENCE IS CONFLICTING IN LEAST DEGREE, the court should leave it entirely to the consideration of the jury. *Buffington v. Cook*, 491.
12. TWO CERTIFICATES, ATTESTING DIFFERENT RECORDS, WITH COMMON SIGNATURE AND SEAL, instead of one certificate for both cases, should not be considered fatally defective, where the two cases constitute an original suit and a collateral case of garnishment. *Gunn v. Howell*, 484.

13. **EXTRINSIC MATTER IN TRANSCRIPT IS NOT GOOD GROUND FOR EXCLUSION OF ENTIRE RECORD.** *Id.*
 14. **WHERE ALL PAPERS ARE NOT SET OUT IN TRANSCRIPT,** the inference is, in the absence of all evidence to the contrary, that they have been lost or destroyed by accident rather than fraudulently suppressed. *Id.*
- See COMMON CARRIERS, 10; CONTRACTS; CONTRIBUTION; CORPORATIONS; CRIMINAL LAW; DAMAGES; EXECUTIONS, 27; JUDGMENTS, 36; HUSBAND AND WIFE, 18, 34, 35; MORTGAGES, 12; NEGOTIABLE INSTRUMENTS, 8; NUISANCE, 5, 6; PAYMENT, 6; PLEADING AND PRACTICE, 5, 11, 18-21, 28; SEDUCTION; TRESPASS, 4; WATERCOURSES, 4; WILLS, 7, 8; WITNESSES, 3.**

EXAMINATION.

See WITNESSES, 11.

EXCEPTIONS.

See PLEADING AND PRACTICE, 27-29.

EXCHANGE.

See BAILMENTS.

EXECUTIONS.

1. **EXECUTION MAY ISSUE UPON JUDGMENT OF DISTRICT COURT,** from which a writ of error has been prosecuted without a *superedeas*. *Castro v. Illies, 277.*
2. **COURT OF EQUITY HAS NO JURISDICTION TO RELIEVE AGAINST IMPROPER ISSUANCE** of a second execution. This error, if it was one, the court issuing it could correct. *Gregory v. Ford, 639.*
3. **POWER OF SHERIFF UNDER FIERI FACIAS TO SELL LAND,** receive purchase-money, indorse sale, receipt for purchase-money, and execute conveyance to purchaser is not a mere naked power, but a power coupled with a trust. *Stewart v. Stokes, 429.*
4. **OMISSION BY SHERIFF TO ADVERTISE SALE AT THREE PUBLIC PLACES IN COUNTY** does not render the sale void, where the statute provides merely that it is "the duty" of the sheriff to so advertise; but the sheriff may be liable for any loss occasioned by such omission to any one interested. *Johnson v. Reese, 757.*
5. **STATUTE DECLARING THAT SHERIFF, IN MAKING SALE ON EXECUTION, SHALL ADVERTISE SUCH SALE** in three of the most public places of the county is directory only, and if the sheriff omit to do so, such omission does not vitiate the sale; but any person injured by such omission has a remedy against the sheriff in an action for damages. *Hendrick v. Davis, 726.*
6. **IN ACTION FOR REFUSING TO COMPLY WITH TERMS OF SHERIFF'S SALE** against the person who bid off the property, he cannot set up as a defense that a deed was exhibited at said sale, and asserted to be a conveyance of the property sold, if such deed was not examined nor read by him. *Id.*
7. **NOTICE OF PLACE OF SALE OF LAND UNDER EXECUTION,** as well as of the time thereof, is required by the statute to be given to the execution defendant by the sheriff, and if the notice given fail to specify the place

of sale, the sale is void; and the presence of the defendant in town on the day of the sale is no waiver of such notice. *Hinson v. Hinson*, 129.

8. **SUBSTITUTION OF ONE BIDDER FOR ANOTHER AT EXECUTION SALE**, after the property is struck off, and before delivery, the substitute taking possession of the property and receiving the bill of sale in his own name, places him in the position of a successful bidder, and not as taking from the original bidder; but he takes the property without warranty and with all the risks which devolve upon a purchaser at an execution sale. *Watson v. Fowlkes*, 184.
9. **IN ACTION FOR REFUSING TO MAKE GOOD BID AT SHERIFF'S SALE**, in order to enable defendant to assign as error the refusal of the court to admit in evidence representations and statements made by the sheriff at such sale, the record must show what such representations and statements were. *Hendrick v. Davis*, 726.
10. **IN ACTION AGAINST PERSON WHO REFUSED TO COMPLY WITH TERMS OF SHERIFF'S SALE**, in order to hold him liable for the difference between the price at which he bid off the property and the price at which it was subsequently sold, the same property must have been resold, and resold as the property of the identical parties as whose property it had been bid off by him. *Id.*
11. **SHERIFF'S RETURN ON EXECUTION** in the words, "I know of no property subject to the within *feri facias*," is equivalent, in a collateral proceeding, to the return of *nuda bona*. *Gunn v. Howell*, 484.
12. **SHERIFF'S RETURN OF SERVICE ON WRIT CANNOT BE TRAVERSED** by parties or privies, except for fraud or collusion. *Tillman v. Davis*, 786.
13. **INDORSEMENT OF SHERIFF UPON EXECUTION RETURNED BY HIM IS MATTER OF RECORD**. *Gunn v. Howell*, 484.
14. **SHERIFF COLLECTING MONEY, AND OF HIS OWN ACCORD DEPOSITING IT IN BANK** which subsequently fails, is personally liable to the plaintiff in execution therefor. *Phillips v. Lamar*, 731.
15. **VOLUNTARY PAYMENT OF EXECUTION OF OFFICER HOLDING IT**, without transfer of the judgment to him, operates not only as a satisfaction of the execution but as an extinguishment of the judgment; notwithstanding the officer by reason of neglect had rendered himself liable under the statute to a judgment, on motion, for the amount. *Lints v. Thompson*, 182.
16. **LAW IMPLIES TRANSFER OF JUDGMENT TO OFFICER PAYING IT** only upon the concurrence of two things: 1. That the liability of the officer in default shall have been fixed by a tribunal of competent jurisdiction; 2. That the judgment shall have been satisfied. *Id.*
17. **TITLE OF PURCHASER OF REAL ESTATE AT EXECUTION SALE DOES NOT DEPEND UPON SHERIFF'S RETURN** to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud v. El Dorado Co.*, 526.
18. **PURCHASER AT EXECUTION SALE RESTS FOR TITLE UPON JUDGMENT**, execution, levy, sale, and deed; and he need not show no more to entitle him to whatever rights the defendant in execution had in the property sold. *Id.*
19. **AUTHORITY OF DEPUTY TO EXECUTE DEED IN NAME OF SHERIFF MUST BE PRODUCED** to entitle the deed to be read in evidence in an action for the possession of the land, where the sheriff's term of office had expired at the time of the execution of the deed. *Id.*

20. IT IS SHERIFF'S TRUST AND DUTY, given to him by law, to execute conveyance under *fiery facias* when purchase-money is paid. *Stewart v. Stokes*, 429.
21. SUIT IN EQUITY IS PROPER FORM OF ACTION TO ENFORCE CONVEYANCE OF REAL ESTATE to purchaser under sheriff's sale, where purchase-money has been paid, and sheriff has died before executing a conveyance. *Id.*
22. WHERE PURCHASE-MONEY HAS BEEN PAID TO SHERIFF, and he dies before execution of a conveyance, equity will grant relief, regarding it as a case of casualty or accident. *Id.*
23. WORDS "TENANT IN POSSESSION," IN SECTION 236 OF CALIFORNIA PRACTICE ACT, providing that the purchaser at a redemption sale "shall be entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation," embrace the judgment debtor as well as his lessee. *Harris v. Reynolds*, 600.
24. JUDGMENT DEBTOR REMAINING IN POSSESSION OF WATER-DITCH AFTER SHERIFF'S SALE, and collecting the rents and profits during the six months following, is a trustee of the fund for the purchaser at the sale, under the California statute; and if the fund be in danger of loss, a bill in equity to account will lie. *Id.*
25. NO ACTION LIES AGAINST SHERIFF FOR LEVYING EXECUTION of individual creditors of a partner on firm property in the latter's hands. *Conroy v. Woods*, 605.
26. UPON QUESTION OF RIGHT OF ASSIGNEE OF EXECUTION TO RECOVER THEREON against the defendant therein, it is proper to inquire into the right of the execution plaintiff to recover thereon, since the assignee stands in his place, and has no better right. *Logan v. Sumter*, 755.
27. IN ACTION BY EXECUTION DEFENDANT AGAINST ASSIGNEE OF EXECUTION TO RECOVER MONEY PAID THEREON, the exemplification of the judgment and the execution against the defendant, and the exemplification of a judgment and an execution against another defendant for the same debt, which show that the execution plaintiff, through whose personal representatives the assignee claimed title, had received payment for the debt, are admissible in evidence, notwithstanding the objection that the judgments and executions are not between the parties to the suit. *Id.*
28. ONE MAY RECOVER MONEY PAID, UNDER BELIEF OF LIABILITY, UPON EXECUTION upon which he was not liable. *Id.*

See BANKRUPTCY AND INSOLVENCY, 7; SHERIFFS.

EXECUTORS AND ADMINISTRATORS.

1. STATUTE REPRESENTATIVE DOES NOT UNIVERSALLY SUCCEED by legal operation to the decedent's title and possession, but as such he takes the property only which is within the state. If he wishes to obtain property which is abroad, he must do so by ancillary appointment. Yet if he acquire such property without such appointment he may hold it subject to the interposition and objection of creditors and legatees. *Upton v. Hubbard*, 670.
2. WHETHER APPOINTMENT OF ADMINISTRATOR IS VOID OR VOIDABLE depends upon whether the court had or had not jurisdiction to make the appointment; if the court has such jurisdiction, any irregularity in the appointment can make it voidable and revocable only, and not void. *Broughton v. Bradley*, 474.

3. **APPOINTMENT OF GENERAL ADMINISTRATOR OF ESTATE OF NON-RESIDENT TESTATOR** instead of an administrator with the will annexed, where the court had jurisdiction to make the latter appointment, is an irregularity which renders the appointment voidable and revocable, but not void, and collaterally impeachable. *Id.*
4. **APPOINTMENT OF ADMINISTRATOR OF ESTATE OF NON-RESIDENT TESTATOR BY COURT HAVING JURISDICTION** to appoint an administrator with the will annexed cannot be impeached in an action by the foreign executor against the person who obtained such appointment after the commencement of the action, on the ground that the defendant did not disclose to the probate court the existence of a will, and misrepresented the amount of the assets within the county, since this does not constitute fraud sufficient to collaterally impeach the appointment. *Id.*
5. **ALABAMA STATUTE PERMITTING FOREIGN EXECUTORS AND ADMINISTRATORS TO MAINTAIN SUITS IN THAT STATE** does not divest the state courts of jurisdiction to grant administration of the effects of a non-resident decedent within the state, and such letters of administration, granted to a defendant after commencement of suit against him by a foreign executor, will defeat the action when set up in a plea *puis darrein continuance*. *Id.*
6. **COUNTY COURT OF VIRGINIA IS COURT OF GENERAL JURISDICTION** in regard to probates and the grant of administrations; it has jurisdiction of the whole subject-matter, and if error is made in taking jurisdiction of a particular case, the order is not void generally, but only voidable on citation or appeal, and cannot be questioned collaterally. The only exception to the above rule is where the supposed testator or intestate is alive, or where, if dead, he has a personal representative in being when administration is granted upon his estate. *Andrews v. Ivory*, 355.
7. **ADMINISTRATION GRANTED BY COUNTY COURT of Virginia** is not void, where the intestate resided and died in another state, leaving no estate in Virginia, and having no personal representative in the latter state. *Id.*
8. **ADMINISTRATION OF ESTATE OF LIVING PERSON IS WITHOUT JURISDICTION AND VOID**; whether granted on direct evidence of death, or on the presumption arising from the fact of absence unheard of for seven years; and no one claiming under the administration can be protected. *Moore v. Smith*, 122.
9. **ADMINISTRATOR MAY MAINTAIN EJECTMENT TO RECOVER POSSESSION OF LAND**, as the statute gives him a right of possession. *Curtis v. Herrick*, 632.
10. **ADMINISTRATOR OF INSOLVENT ESTATE, PART OF WHICH IS UNDIVIDED HALF-INTEREST IN REALTY**, may maintain a bill in equity to restrain an improper subletting, which would injure the value of the property or lessen the rents. *Parkman's Adm'r v. Aicardi*, 457.
11. **ADMINISTRATOR CANNOT PAY OUT MONEY OF ESTATE TO REMOVE INCUMBRANCES** from the property, unless the intestate was bound to pay the money; although a court of chancery might authorize the expenditure to prevent a sacrifice. *Knight, Estate of*, 531.
12. **ADMINISTRATOR ACTS UPON HIS OWN RESPONSIBILITY** if he undertakes to go beyond the strict line of his duty as the law defines it, and while he can receive no profit from a successful issue of his investment, he must bear the loss of failure. *Id.*

13. LEGATEES UNDER WILL MADE IN ANOTHER STATE BY RESIDENT THEREOF MAY SUE IN EQUITY ADMINISTRATOR of estate of their testatrix, in Rhode Island, for an account of the assets and the payment of their legacies, notwithstanding such will has not been proved or filed and recorded in Rhode Island, since they sue in their own right, and not in the right of their testatrix, or as her representatives. *Olney v. Angell*, 62.
 14. DISTRIBUTORS AND HEIRS AT LAW MAY OBTAIN RELIEF IN EQUITY AGAINST DECREE OF PROBATE COURT allowing the administrator on final settlement a credit to which he was not entitled by showing that for the purpose of inducing the complainants not to object to the allowance of the credit he falsely represented the correctness of the credit, and falsely stated circumstances plainly demonstrating its correctness, and that they were ignorant upon the subject, and relying upon the representations, forebore to object. *Mock's Heirs v. Steele*, 455.
 15. EXECUTOR IS ENTITLED, AS SUCH, TO HIS COUNSEL FEE EXPENDED IN ESTABLISHING WILL before the ordinary in solemn form; but if he is also a devisee and legatee, the devise and legacies to him are chargeable with such fee and other expenses, ratably in proportion to the value of the estate. *McClellan v. Hetherington*, 89.
- See CO-TENANCY, 10; ESTATES OF DECEDENTS, 1; FRAUDULENT CONVEYANCES, 3, 9; JUDGMENTS, 10; PARTNERSHIP, 2, 5; SURETYSHIP, 1, 2.

EXEMPLARY DAMAGES.

See ATTACHMENTS, 24.

EXEMPLIFICATION.

See EVIDENCE, 12-14; EXECUTIONS, 27.

EXEMPTIONS.

See HOMESTEADS; TAXATION, 8, 10-14, 16-18.

EXPRESS COMPANIES.

See COMMON CARRIERS, 6, 8.

FEES.

See ARBITRATION AND AWARD, 4; EXECUTORS AND ADMINISTRATORS, 15.

FERRIES.

1. FERRY-MAN IS LIABLE AS COMMON CARRIER, and must have a safe boat, a skillful ferry-man, and sufficient force to manage the boat and care for persons and property received for transportation. He is liable for loss or injury occasioned by neglect of these duties and precautions. *Sanders v. Young*, 175.
2. CONSTRUCTION OF STATUTE.—When statute authorizes county court to excuse ferry-man from having hand-rails upon his boat for the greater security of stock, and the county court does so excuse him, his duties and liabilities as a ferry-keeper under the common law are in no way diminished. *Id.*

FINES.

See CRIMINAL LAW, 1; NEGOTIABLE INSTRUMENTS, 2.

FIRES.

See RAILROADS, 16.

FORECLOSURE.

See MORTGAGES; TRUSTS AND TRUSTEES.

FOREIGN ASSIGNMENTS.

See BANKRUPTCY AND INSOLVENCY, 2-7.

FOREIGN JUDGMENTS.

See JUDGMENTS.

FOREIGN LAWS.

See LIENS.

FRANCHISE.

See TAXATION, 12, 13, 16-18.

FRAUD.

1. FRAUD IS DEFENSE WHICH IS COGNIZABLE AS WELL IN COURTS OF LAW AS OF EQUITY, and is considered even more odious than force. *Drinkard v. Ingram*, 250.
 2. EQUITY WILL CANCEL CONVEYANCE AND REINSTATE GRANTOR IN TITLE AND POSSESSION where he was an illiterate old man, and was induced to convey without consideration to his son-in-law by the false and fraudulent representations of the latter that some pecuniary liability might fall upon the grantor; and it is no defense that a party cannot allege his own fraud, since the grantor, having no creditors to be prejudiced by the conveyance, was guilty of no fraud. *Davis v. McNalley*, 159.
 3. INSTRUMENT FRAUDULENT AB INITIO IS VOID for all purposes of protection to the fraudulent actor. *Goodwin v. Hammond*, 574.
 4. QUESTION OF FRAUD IN FACT IS WITHIN PROVINCE OF JURY, and a judgment rendered therein by the court is error, no matter how just. *Drinkard v. Ingram*, 250.
- See EQUITY, 8; FRAUDULENT CONVEYANCES; JUDGMENTS; HUSBAND AND WIFE; MARRIED WOMEN; POWERS, 1; STATUTE OF FRAUDS; WILLS, 4.

FRAUDULENT CONVEYANCES.

1. CONVEYANCE, TO BE VALID AS TO THIRD PARTIES, MUST NOT ONLY BE UPON GOOD CONSIDERATION, but must be *bona fide* also, and not made to hinder, delay, or defraud creditors. *Castro v. Illies*, 277.
2. VOLUNTARY CONVEYANCE TO CHILD, RELATIVE, OR EVEN TO STRANGER IS GOOD AND VALID if it be not at the time prejudicial to the rights of any other person, or in execution of any meditated scheme of future fraud or injury to other persons. *Nicholas v. Ward*, 177.
3. VOLUNTARY GIFT OR CONVEYANCE BY PARTY NOT INDEBTED IS VOID, if made with any design of fraud or collusion or injury to other persons in the future. *Id.*
4. CONVEYANCE MADE TO DEFRAUD EXISTING CREDITORS IS GENERALLY HELD VOID as to subsequent creditors. *Id.*

6. VOLUNTARY CONVEYANCE IS PRESUMED TO BE FRAUDULENT AS TO EXISTING CREDITORS; but as to subsequent creditors there is no such presumption, and fraud in fact must be established. *Id.*
6. SUBSEQUENT CREDITORS CANNOT COMPLAIN THAT DEBTOR'S NOTE AND MORTGAGE WERE EXECUTED WITHOUT CONSIDERATION. *Horn v. Volcano Water Co.*, 569.
7. VOLUNTARY CONVEYANCE IS NOT VOID AS AGAINST SUBSEQUENT CREDITORS unless fraudulent in fact—that is, made with a view to future debts—but evidence of an intent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors. *Id.*
8. PERSONAL REPRESENTATIVE OF FRAUDULENT VENDOR, who remained in possession of the property until the time of his death, can, because of the non-delivery, set up the fraud for the benefit of creditors, and thus avoid the sale. *Hunt v. Butterworth*, 223.
9. EXECUTOR OR ADMINISTRATOR CANNOT IMPROACH DEED OF HIS TESTATOR OR INTERSTATE FOR FRAUD, except in case of the non-delivery of the fraudulent gift or deed to the donee. *Id.*

See EQUITY, 10.

GARNISHMENT.

See ATTACHMENTS; ATTORNEY AND CLIENT,

GENERAL ISSUE.

See NEGOTIABLE INSTRUMENTS, 18; PLEADING AND PRACTICE, 6.

GIFTS.

See EQUITY, 10; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE; MISTAKE; PARENT AND CHILD.

GROWING GRAIN.

See RAILROADS, 16.

GUARANTY.

See NEGOTIABLE INSTRUMENTS, 6-8.

GUARDIAN AND WARD.

See ESTOPPEL, 3.

HEIRS.

See DEEDS, 2.

HIGHWAYS.

1. PROTEST AGAINST STREET IMPROVEMENT IS INEFFECTUAL, if it is not made within the statutory time, and if it does not appear that the required number of owners united in it, where the charter of a municipal corporation authorized the common council to levy special assessments for grading or improving the streets, and provided that when the council thought it expedient to open, alter, or improve any street, they should give notice by publication, and if one third of all the owners in value protested against the proposed improvement within ten days after the last publication, it should not be made. *Burnett v. Sacramento*, 518.

2. **PRIVATE PROPERTY IS NOT TAKEN FOR PUBLIC USE**, within the meaning of the constitutional inhibition, by assessing the expenses of grading a street, already opened, upon the adjacent property. *Id.*
3. **TRAVELER MAY NOT REMAIN STUBBORNLY AND DOGGEDLY UPON RIGHT OF TRAVELED PART OF HIGHWAY**, and wantonly produce a collision which a slight change of position would have avoided. Persons meeting on highways owe to each other reciprocal duties, and are bound to use reasonable precautions to avoid collision. *O'Malley v. Dorn*, 403.
4. **MUNICIPAL CORPORATION IS NOT LIABLE FOR DAMAGES CAUSED IN GRADING STREET** by digging so near plaintiff's lot that the earth supporting it crumbled away and his fence fell, if the corporation had authority to grade the street and did not act in excess of its authority. *Mayor etc. of Rome v. Omberg*, 748.

See TAXATION, 1-3.

HOMESTEADS.

1. **WHERE CLAIM OF HOMESTEAD EXEMPTION WAS ADJUDICATED ADVERSELY TO DEFENDANT** in an action to foreclose a mortgage upon the premises, it cannot be again interposed as a defense to an action for the possession brought by the purchaser under the foreclosure judgment. This adjudication, until reversed or annulled by some direct proceeding for that purpose, is, whenever brought collaterally in question, conclusive of the matters therein adjudicated. *Tadlock v. Eccles*, 213.
2. **CLAIM OF HOMESTEAD EXEMPTION HAVING BEEN ADJUDGED AGAINST FATHER**, his children are bound thereby. *Id.*
3. **HOMESTEAD RIGHT CANNOT BE ASSERTED MERELY TO BUILDING**, independent of the land upon which the building is erected. *Smith v. Smith*.

HOMICIDE.

See CRIMINAL LAW, 6-10.

HORSES.

See ANIMALS, 1.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE MAY BE CHARGED JOINTLY IN ALL ACTIONS FOR TORT** in which two or more persons may be jointly guilty. *Simmons v. Brown*, 66.
2. **IMPLIED AUTHORITY OF WIFE KNOWN TO LIVE SEPARATE FROM HER HUSBAND**, to bind him for necessities supplied to her, depends wholly upon his legal obligation to provide for her, and is unaffected by the ignorance or knowledge of the creditor as to the facts upon which such liability depends. *Gill v. Read*, 73.
3. **ADULTERY OF WIFE RELIEVES HUSBAND FROM OBLIGATION TO PROVIDE HER WITH NECESSARIES**, whether such adultery is committed before or after her separation from her husband, and whether the person supplying her with necessities knew of the adultery or not. *Id.*
4. **DECREE DISMISSING HUSBAND'S PETITION FOR DIVORCE FOR CAUSE OF ADULTERY** is not evidence, in an action against him for necessities furnished to his wife during their separation, to prove that she did not commit adultery prior to the petition for divorce or during its pendency.

- And he is not estopped by such decree from offering in defense in such action proof of the adultery of his wife prior to the accruing of the plaintiff's account. *Id.*
5. WIFE LIVING SEPARATE FROM HUSBAND HAS NO AUTHORITY TO BORROW MONEY at his charge; but if the lender lays out the money, or sees it laid out, for necessities, he may charge them as provided by himself. *Id.*
 6. PROMISE MADE BY HUSBAND TO GRANT CERTAIN PERSONAL PROPERTY to his wife, upon her paying his debt, simply creates an obligation or duty on the part of the husband to vest title in the wife. *Little v. Birdwell*, 242.
 7. VERBAL SALES AND GIFTS BETWEEN HUSBAND AND WIFE ought not to be admitted unless on clear and satisfactory proof that the property was divested out of the vendor and vested in the vendee or donee. *Id.*
 8. INTENTION OF HUSBAND IN CONVEYING PROPERTY TO HIS WIFE IS PRESUMED TO BE KNOWN TO HER. From the relations of the parties, it is scarcely to be supposed that this is not so. *Castro v. Illies*, 277.
 9. HUSBAND IS BOUND TO SUPPORT AND MAINTAIN HIS WIFE, and is entitled to her labor and earnings, while they live together in the usual course of the marital relation. *Norcross v. Rodgers*, 323.
 10. HUSBAND CANNOT RECOVER HIS WIFE'S EARNINGS FROM ONE who has employed and paid her, where the wife has for a considerable period, voluntarily and without good reason, lived apart from her husband, and supported herself without any assistance from him, and where the husband, prior to the payment to the wife, did not claim her earnings. *Id.*
 11. HUSBAND CANNOT CONVERT HIS WIFE'S CHoses IN ACTION TO HIS OWN POSSESSION without doing some positive act towards that end. *Barber v. Glade*, 299.
 12. ACTS OF HUSBAND WHICH WILL NOT CONSTITUTE REDUCTION OF WIFE'S NOTE TO HIS POSSESSION.—Where the makers of a promissory note, given for the purchase of the wife's real estate, and made payable to her or bearer, deliver it to the husband, who immediately turns it over to the wife, she afterwards retaining the same in her possession, the note is not converted by the husband, and the wife's property therein is not divested. *Id.*
 13. FRAUD UPON WIFE IS NOT COMMITTED by the husband's purchasing lands after marriage with his separate funds acquired before marriage, and taking the conveyance in the names of his minor children by a previous marriage. *Smith v. Smith*, 533.
 14. ALL PROPERTY ACQUIRED BY EITHER SPOUSE DURING EXISTENCE OF COMMUNITY is presumed to belong to it, and this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and the burden of proof lies upon the party claiming the property as separate. *Id.*
 15. PRESUMPTION THAT BUILDING IS BUT FORM IN WHICH COMMON PROPERTY IS INVESTED is too cogent to be overcome by loose and unsatisfactory evidence, where it was erected during the existence of the community. *Id.*
 16. DESIGN OF LAW IN VESTING IN HUSBAND ABSOLUTE POWER OF DISPOSITION OF COMMON PROPERTY was to facilitate its *bona fide* alienation, and to prevent clogs upon its transfer by claims of the wife. *Id.*

17. **VOLUNTARY DISPOSITION OF COMMON PROPERTY BY HUSBAND**, with the view of defeating any claims of the wife thereto, will not be supported by the law. *Id.*
18. **DECLARATIONS OF HUSBAND AND WIFE, MADE AFTER EXECUTION OF SETTLEMENT** made by the wife before the marriage upon her children born by a former marriage and to be born, are not admissible as evidence affecting the validity of the deed. *Anonymous*, 461.
19. **DURESS TO INVALIDATE DEED EXECUTED BY WIDOW SHORTLY BEFORE HER SECOND MARRIAGE**, conveying her property to her children born and to be born, and reserving a life estate to herself, is not shown by proof of the distressed state of feelings exhibited by the grantor at the time of the execution of the deed, and of threats made by her son against her intended husband, but not communicated to her, when it appears that her distress and the threats were caused by her then pregnancy by her intended husband; especially where there appears to have been good reasons for the deed, and her second husband did not deny the validity of the deed for more than twenty years. *Id.*
20. **SECRET SETTLEMENT BY WIDOW TWO DAYS BEFORE SECOND MARRIAGE**, conveying her property to her separate use for life, with remainder to her children born and to be born, is not a fraud upon the marital rights of her intended husband, when at the time of the execution of the settlement she was pregnant by him. *Id.*
21. **PROPERTY RIGHTS OF PERSONS MARRIED IN OTHER COUNTRIES, WHO HAVE REMOVED AND BECOME DOMICILED HERE**, in the absence of an express contract, are to be governed, as to all after acquisitions of property here, by the laws of this state. *Castro v. Illies*, 277.
22. **WHERE THERE IS EXPRESS NUPTIAL CONTRACT**, if it speaks fully to the very point, it will generally be admitted to govern all the property of the parties, not only in the matrimonial domicile, but in every other place under the limitations and restrictions which apply to other cases of contracts, that they are not in contravention of the laws or policy of the country where they are sought to be enforced, or with the rights of its own citizens who contract with such parties, with regard to notice of their marriage contract. *Id.*
23. **EXPRESS NUPTIAL CONTRACT GOVERNS PROPERTY RIGHTS OF MARRIED PERSONS**, in movable property everywhere, but as to immovable property in a foreign territory it will at most confer only a right of action, to be enforced according to the jurisprudence *rei sitæ*. But where there is a change of domicile, the law of the actual domicile will govern as to all future acquisitions of movable property, and as to all immovable property the law *rei sitæ*. *Id.*
24. **MARRIAGE CONTRACT—CHANGE OF DOMICILE**.—Where there is an express nuptial contract, that governs as to all acquisitions and gains of property made by the parties where they were married and continue to reside. Where there is no such contract, the customary law of the matrimonial domicile governs in like manner. But in both cases all acquisitions and gains made after a change of domicile are governed by the law of the actual domicile. *Id.*
25. **WHERE THERE HAS BEEN CHANGE OF DOMICILE AFTER MAKING OF EXPRESS NUPTIAL CONTRACT**, the law of the after-acquired domicile will govern as to all after-acquired property; unless where the contract was

made with reference to that law, or in view of a change of domicile, and it was the intention of the parties that the contract should govern wherever they should reside. *Id.*

23. **MARRIAGE CONTRACT AFFECTING AFTER-ACQUIRED PROPERTY, IN CASE OF CHANGE OF DOMICILE.**—A marriage contract referred to the laws of the country where the parties were married, and declared that the property rights of the parties should be governed by such laws. It made no provision with regard to after-acquired property, nor did it refer to a change of residence. *Held*, that the inference would be that the parties did not contemplate a change of domicile, nor contract with reference thereto, and that while the contract would govern their after-acquired property in the country where they were married, it would have no influence beyond the jurisdictional limits of the laws of that country. *Id.*
 27. **NOTICE OF MARRIAGE CONTRACT CHANGING PROPERTY RIGHTS OF PARTIES THERETO.**—Whatever may be the property rights of parties to a nuptial contract entered into in a foreign country, as between themselves their contract cannot have the effect to govern their rights in their real property, acquired and situated in Texas, to the prejudice of the rights of her citizens who have contracted on the faith of the property, and without notice of a contract giving it a different *status* from that of other parties, or establishing a rule for its government variant from the law of the land. *Id.*
 25. **PROPERTY CONVEYED TO MARRIED WOMAN IS PRESUMED TO BE COMMUNITY PROPERTY**, and it devolves upon her to show by clear and satisfactory proof that it was purchased with her own individual means. *Id.*
 29. **ALL PROPERTY ACQUIRED AFTER MARRIAGE BY EITHER HUSBAND OR WIFE IS COMMON PROPERTY**, in California, except such as may be acquired by gift, bequest, devise, or descent. *Meyer v. Kinzer*, 538.
 30. **COMMON PROPERTY MAY BE SOLD OR CONVEYED BY HUSBAND** without his wife's joining in the transfer. *Id.*
 31. **PRESUMPTION ATTENDING POSSESSION OF PROPERTY BY EITHER SPOUSE IS THAT IT BELONGS TO COMMUNITY**; and this presumption can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterwards by gift, bequest, devise, or descent, or that it is property taken in exchange for, or in the investment, or as the price of the property so originally owned or acquired. The burden of proof rests with the claimant of the separate estate. *Id.*
 32. **PURCHASE WITH SEPARATE FUNDS OF EITHER SPOUSE MUST BE AFFIRMATIVELY ESTABLISHED** by clear and decisive proof. In the absence of such proof, the presumption is absolute and conclusive that the property is common property, and it makes no difference whether the conveyance is taken in the name of one or the other, or in the names of both. *Id.*
 33. **FACT OF PURCHASE EXCLUDES SUPPOSITION OF ACQUISITION** by gift, bequest, devise, or descent. *Id.*
 34. **WHERE PROPERTY IS GRANTED TO HUSBAND AND WIFE, PAROL EVIDENCE MAY BE INTRODUCED** to show that the husband's name was inserted by mistake, and that it was not community but separate property. *Duncan v. Chatham*, 228.
 35. **WHERE GIFT IS MADE TO HUSBAND ALONE, PAROL EVIDENCE IS ADMISSIBLE** to prove that the gift was in trust for the use of the wife. *Id.*
- See **MARRIAGE AND DIVORCE; MARRIED WOMEN; PAYMENT, 5, 6; POWERS.**
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IMPEACHMENT.

See ARBITRATION AND AWARD, 2; FRAUDULENT CONVEYANCES; WITNESSES, 8-11.

IMPROVEMENTS.

See CO-TENANCY; HIGHWAYS; LANDLORD AND TENANT; TAXATION, 1, 2.

INCEST.

See MARRIAGE AND DIVORCE, 1-2.

INDEMNITY.

See AGENCY, 4, 5.

INDICTMENT.

See CRIMINAL LAW, 11.

INDORSEMENTS.

See EXECUTIONS 13; NEGOTIABLE INSTRUMENTS; SHIPPING, 2.

INFANCY.

See PARENT AND CHILD.

INJUNCTIONS.

1. OWNER OF LAND IN POSSESSION IS ENTITLED TO INJUNCTION to prevent insolvent defendants from entering upon such land, and by means of excavations, embankments, and diversion of valuable streams, committing irreparable injury, and despoiling the land of the substance of the inheritance, besides creating a cloud upon the plaintiff's title. *Bensley v. M. L. W. Co.*, 575.
 2. DECREE AGAINST LEGATEE FOR COSTS IN SUIT to enforce execution of new bond is no ground for injunction to restrain an action at law by the legatee for his legacy, as such costs could be set off in the action at law. *Hayes v. Hayes*, 709.
 3. RECOVERY OF LEGACY AT LAW WILL NOT BE ENJOINED IN EQUITY on the ground that the legatee is indebted in a bond to the testator payable at a future day. *Id.*
 4. LEGATEE'S ACTION AT LAW FOR LEGACY WILL NOT BE ENJOINED IN EQUITY on the ground that he is in contempt for not performing a decree made in another suit for the execution of a new bond, in the place of the original one given to the testator and subsequently lost. *Id.*
- See EXECUTORS AND ADMINISTRATORS, 10; JUDGMENTS, 30-32; LANDLORD AND TENANT, 1; TAXATION, 2, 4.

INNS.

1. INNKEEPER IS ONE WHO HOLDS HIMSELF OUT TO PUBLIC as engaged in the business of keeping a house for the lodgment and entertainment of travelers, their horses and attendants, for reasonable compensation. He is liable for any loss of property committed to his keeping, which any care or vigilance on his part could have prevented. *Houth v. Franklin*, 218.

1. ONE WHO ONLY OCCASIONALLY ENTERTAINS TRAVELERS FOR COMPENSATION, when it suits his pleasure, and who does not hold himself out to the public as the keeper of a house for the accommodation of the traveling public, is only bound to take that ordinary care of property committed to his keeping that a prudent man does of his own property. *Id.*
2. WHEN PROPERTY COMMITTED TO CUSTODY OF INNKEEPER BY HIS GUEST IS LOST, the presumption is that the innkeeper is liable for it, and he can only excuse himself by showing that he has used extreme care and diligence. *Id.*
3. PERSON MAY HOLD HIMSELF OUT TO PUBLIC AS INNKEEPER BY HIS ACTS, as well as by declarations, or by a sign, and he may become liable as such, even against his declarations. *Id.*
4. FARMERS WHOSE HOUSES ARE SITUATED ALONG PUBLIC ROADS of the country, who occasionally, and even frequently, take in and accommodate travelers, and receive compensation therefor, are not innkeepers, nor are they liable as such. *Id.*

INSANITY.

SERVICES OF PROCESS UPON PERSON OF INSANE DEFENDANT who is under a conservator imposes upon him no obligation, and confers no jurisdiction on the court. *Litchfield's Appeal*, 662.

See MARRIAGE AND DIVORCE, 8.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSTRUCTIONS.

See CRIMINAL LAW, 2, 3, 10; PLEADING AND PRACTICE, 17-22.

INTEREST.

INTEREST FOLLOWS CONTRACT ACCORDING TO LAW IN EXISTENCE at the time and place of the contract, or of the performance of it, and a subsequent change in the legal rate does not affect the contract. Consequently, where the legal rate was six per cent at the time a contract was entered into, but was afterwards changed to ten, it is improper to allow six per cent up to that time and ten per cent afterwards. *Aguirre v. Packard*, 645.

See ESTATES OF DECEDENTS.

INTERPLEADER.

See BANKRUPTCY AND INSOLVENCY, 4.

INTERVENTION.

1. IN ACTION ON NOTE AND MORTGAGE, INTERVENING CREDITORS of the defendant, who allege the note and mortgage to be fraudulent as against them, cannot therefor prevent a judgment for plaintiff against defendant, but are entitled merely to protection against the enforcement of the judgment to their prejudice. *Horn v. Volcano Water Co.*, 569.
2. TO ENTITLE PERSON TO INTERVENE IN SUIT, HE MUST HAVE INTEREST IN MATTER IN LITIGATION, of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and

- effect of the judgment. His interest must be one created by a claim to the demand, or some part thereof in suit, or by a claim to or lien upon the property, or some part thereof, which is the subject of litigation. *Id.*
3. SIMPLE CONTRACT CREDITOR OF COMMON DEBTOR CANNOT INTERVENE in a foreclosure suit against debtor. *Id.*
 4. JUDGMENT CREDITORS HAVING LIEN MAY INTERVENE IN FORECLOSURE SUIT AGAINST DEBTOR as subsequent incumbrancers. *Id.*
 5. JUDGMENT CREDITORS HAVING LIENS ON MORTGAGED PREMISES are necessary parties to a complete adjustment of all interests in such premises, and the court may order them to be made parties on petition of intervention, or by amendment of the complaint. *Id.*

INTOXICATING LIQUORS.

See ATTACHMENTS, 5.

INVENTORY.

See ESTOPPEL, 2, 3; WILLI, 24.

JOINDER.

See PLEADING AND PRACTICE, 2.

JOINT TENANCY.

See CO-TENANCY.

JUDGMENTS.

1. LEGISLATURE CANNOT REQUIRE SUPREME COURT TO STATE REASONS FOR ITS DECISIONS IN WRITING, the constitutional duty of the court being discharged by the rendition of its decisions. *Houston v. Williams*, 565.
2. IT IS DISCRETIONARY WITH COURT WHETHER IT WILL GIVE OPINION ON PRONOUNCING JUDGMENT, and if given, whether it will be oral or in writing. *Id.*
3. DECISION OF COURT CONSTITUTES ITS JUDGMENT, while the opinion represents merely the reasons for that judgment. *Id.*
4. DECISION OF SUPREME COURT IN CALIFORNIA IS ENTERED OF RECORD IMMEDIATELY on its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing or a modification. But the opinion of the court is the property of the judges, subject to their revision, correction, and modification in any particular deemed advisable until, with the approbation of the writer, it is transcribed on the records, when it ceases to be subject to change, except through regular proceedings before the court therefor, by petition. *Id.*
5. WHERE JUSTICE'S DOCKET IS SHOWN TO BE LOST, and an execution is shown to have issued upon a judgment alleged to have been entered in such docket, and a purchaser of real estate at a sale thereunder is shown to have occupied the land nearly ten years, and not to have been disturbed by the execution debtor, it is a natural presumption, not at all remote, that such a judgment as that recited in the execution really did exist, and it should be left to the jury to find whether it did or not. *Walker v. Emerson*, 207.
6. WHERE FOREIGN COURT AMENDS JUDGMENT rendered in favor of a deceased defendant *nunc pro tunc*, on behalf of his representatives, it will be pre-

- sumed that the amendment was within the jurisdiction of the court. *Gunn v. Howell*, 484.
7. **GOOD PERSONAL DEFENSE BY ONE JOINT DEFENDANT** will not prevent a judgment against the remaining defendants. *St. Albans Bank v. Dillon*, 295.
 8. **DECISION OF COURT OF COMPETENT JURISDICTION, DIRECTLY UPON QUESTION**, or necessarily involving the decision of a question, is conclusive between the parties and their privies upon the same matter, coming directly in question in a collateral action, in the same or another court of concurrent jurisdiction. Such decree must stand until annulled or reversed by a proper proceeding. *Tadlock v. Eccles*, 213.
 9. **DIMISSAL OF FORMER SUIT WILL BE TECHNICAL BAR TO SUBSEQUENT SUIT** upon the same point or matter, and where the same plaintiff or his representatives appears against the same defendant or his representatives. *Hunt v. Butterworth*, 213.
 10. **IN SUIT BY ADMINISTRATOR OF ESTATE FOR BENEFIT OF HEIRS AT LAW, RECOVERY BY OR AGAINST** the latter may be pleaded in bar, there being no debts due or owing by the intestate. *Hardaway v. Drummond*, 730.
 11. **VALIDITY OF DECREE CANNOT BE COLLATERALLY ATTACKED**, for the purpose of destroying the jurisdiction of the court, by proof of want of service of process. *Bridgeport Sav. Bank v. Eldredge*, 688.
 12. **CONCLUSIVE EFFECT OF JUDGMENT AS EVIDENCE** rests upon the authority of the court; upon its acting within its jurisdiction; upon its preserving its decisions in proper records; and upon the policy and necessity of determining by law the end of controversy. *Carpenter v. Pier*, 288.
 13. **JUDGMENT OF JUSTICE OF PEACE IS JUDICIAL PROCEEDING**, within section 1 of article 4 of the United States constitution; and being made in one state, is as conclusive between parties and privies thereto, though living in another state, as a judgment of the highest court of record. *Id.*
 14. **FACTS WHICH ESTABLISH PRIVACY**.—Where one transfers a note to another, warranting it to be valid, and upon suit by the assignee against the maker attends the trial, secures a continuance to bring witnesses to sustain the suit, his relation to the subject-matter of the suit, and his conduct, so make him a privy to the suit as to be concluded by the judgment. *Id.*
 15. **SUIT BEGUN BY PARTIES VOLUNTARILY APPEARING AND JOINING ISSUE IS VALID** in New York, and a judgment rendered in a suit so begun is as binding as if commenced in the ordinary way. *Id.*
 16. **PARTY MAY WAIVE EXCESS OF CLAIM OVER ONE HUNDRED DOLLARS**, and bring suit in justice's court, and such waiver will not affect the conclusiveness of the judgment upon parties and privies. *Id.*
 17. **OMISSION TO INSIST ON CONCLUSIVENESS OF JUDGMENT AS EVIDENCE** until near the close of the trial, and the introduction of other evidence, besides the judgment, to the same point, does not preclude the right to an instruction to the jury that the judgment is conclusive. *Id.*
 18. **JUDGMENT OBTAINED BY FRAUD** cannot be made the basis of a recovery though it may have been rendered upon a just demand. *Drinkard v. Ingram*, 250.
 19. **TO ANNUL JUDGMENT FOR FRAUD**, legal or technical fraud is not sufficient; actual positive fraud or fraud in fact must be shown. *Cayce v. Powell*, 211.

20. **CONFESSION OF JUDGMENT BY DEBTOR TO BONA FIDE CREDITOR IS NOT FRAUDULENT** as against other creditors, because of the mere fact that the debtor knows that such creditor intends to settle the larger portion of the debt on the debtor's family. *Cureton v. Doby*, 96.
21. **JUDGMENT IS ERRONEOUS FOR UNCERTAINTY WHICH DROPPES** that plaintiffs do recover of defendant "their debt, damages, and costs," without giving the amount or referring to the verdict, although the verdict in which the amounts are given is recited in the entry. *Barnett v. Caruth*, 255.
22. **OMISSION OF FOREIGN RECORD TO SHOW THAT JURY WAS IMPANELED AND SWORN**, the service of the *scire facias* for the revivor of the suit on the defendants' attorney, and the failure of the record in the collateral garnishment suit to show that the original judgment was for an amount as great as that which was rendered against the garnishee, are mere irregularities which do not render the judgments void. *Gunn v. Howell*, 484.
23. **JUDGMENT OUGHT NOT TO BE ARRESTED**, where the jury purport to find upon certain counts, but their verdict shows that they considered other counts, less questionable, even though the counts upon which the verdict was expressly found were insufficient. *Ryan v. Copes*, 106.
24. **JUDGMENT BY CONFESSION CANNOT BE ATTACKED**, for intervening errors at the instance of one not a party to the judgment, where it is rendered in open court, upon an allegation of indebtedness, and an appearance by the parties. *Cloud v. El Dorado County*, 526.
25. **MANNER OF EXERCISING JURISDICTION CANNOT MAKE ACTION OF COURT VOID**, where the court has jurisdiction both of the parties and the subject-matter. *Id.*
26. **PETITION TO SET ASIDE JUDGMENT—MERITS.**—A defendant having no defense to an action, wherein a judgment by default was rendered against him upon a return by the sheriff of service of process, cannot enjoin such judgment upon the ground that the return was false, and that in fact he had no notice of the proceeding. *Gregory v. Ford*, 639.
27. **EQUITY, WHERE PARTY SEEKS TO HAVE JUDGMENT BY DEFAULT RECOVERED AGAINST HIM, UPON SHERIFF'S FALSE RETURN OF SERVICE UPON HIM, SET ASIDE.**—Where a party does not deny the indebtedness for which the judgment was rendered, it would be as equitable to turn him over to his action against the sheriff for a false return as to relieve him from the judgment and turn the defendant for redress to the sheriff, the statute having barred the debt. *Id.*
28. **COURTS OF EQUITY DO NOT INTERFERE WITH JUDGMENTS AND PROCEEDINGS** of courts of law except in peculiar cases. They do not interpose to correct the errors or irregularities of the law courts. They only interpose upon equitable grounds to do justice, when, from their organization or otherwise, the common-law tribunals are incapable of rendering it. There must be substantial merits; they seldom or never give effect to a mere technical right. *Id.*
29. **PARTY WHO SEEKS TO HAVE JUDGMENT WHICH WAS IMPROPERLY RECOVERED** against him set aside must pay into court the sum which by his own statements he has shown himself to owe to plaintiff. He who seeks equity must do equity. *Id.*
30. **COURT OF EQUITY WILL RESTRAIN UNJUST JUDGMENT** for want of notice after a false return of service by the sheriff. *Id.*

81. EQUITY WILL RESTRAIN ENFORCEMENT OF JUDGMENT not impeachable at law when such judgment has been obtained by fraud, accident, or mistake. *Litchfield's Appeal*, 662.
 82. WHILE EQUITY WILL RESTRAIN ENFORCEMENT OF INEQUITABLE JUDGMENT, it will enforce the payment by the judgment debtor of a debt justly due by him to the creditor. *Id.*
 83. JUDGMENT OF STATE COURT HAS SAME CREDIT, validity, and effect in every other court of the United States which it has in the state where pronounced, and whatever plea would be good to a suit thereon in such state, and no other, can be pleaded in any other court of the United States *Bank of N. A. v. Wheeler*, 683.
 84. RECOVERY OF JUDGMENT IN ONE STATE IS BAR to the further prosecution of the same cause of action by the same parties in another state. *Id.*
 85. DOMESTIC JUDGMENT MERGES AND EXTINGUISHES CAUSE OF ACTION for which it was rendered in the courts of the same jurisdiction; consequently, no suit can be maintained upon the original cause of action, but only upon the judgment. *Id.*
 86. JUDGMENT IS ALWAYS ADMISSIBLE IN EVIDENCE AS PROOF OF ITS RENDITION, when that fact is important or relevant, but not as proof to charge a stranger directly by its operation. *Pico v. Webster*, 647.
- See AGENCY, 5; ATTACHMENTS, 7, 9, 15-17, 19; BANKRUPTCY AND INSOLVENCY, 7; BONA FIDE PURCHASERS, 1; CONTRIBUTION; EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 14; HOMESTEADS, 1, 2; INJUNCTIONS, 2, 4; INTERVENTION; MARRIED WOMEN, 11; PLEADING AND PRACTICE, 4, 14, 15, 23; PROBATE COURTS, 4-6; RECEIVERS; SURETYSHIP, 4, 5.

JUDICIAL SALES.

1. INADEQUACY OF PRICE, HOWEVER GROSS, does not invalidate a judicial sale, made at the time and place prescribed by law, upon due notice, and without proof of any fraud, or unfairness, or means used to prevent competition. *Brittin v. Handy*, 497.
2. COMMISSIONER HAS DISCRETION TO WITHDRAW LAND FROM SALE, after it has been offered, and even after a bid has been received and cried, and if he does so, the highest and last bidder is not entitled to a conveyance, there being no contract with him. The commissioner's discretion, however, is subject to the control of the court in this regard. *Miller v. Law*, 92.
3. PURCHASER AT CHANCERY SALE ACQUIRES NO TITLE TO ESTATE UNTIL CONFIRMATION OF SALE. He is not liable in the interim to any loss or injury that may happen to the estate, and may, on proper grounds, refuse to execute the purchase. *Houston v. Aycock*, 131.
4. BEFORE CONFIRMATION OF CHANCERY SALE, BIDDINGS MAY BE OPENED ON an offer to advance the price in a sum deemed adequate, supported by other reasons in favor of the application. *Id.*
5. PURCHASER AT CHANCERY SALE BECOMES OWNER OF ESTATE AFTER CONFIRMATION, is subject to any loss or injury it may sustain, and is bound to execute the terms of his contract. *Id.*
6. AFTER CONFIRMATION OF CHANCERY SALE, PURCHASER'S TITLE WILL NOT BE DISTURBED BY OPENING BIDDINGS upon an offer of an advance in price, however large, except in case of fraud, accident, mistake, or the existence of some relation of trust between the parties. *Id.*

7. PURCHASE FROM COMMISSIONER SELLING UNDER ORDER OF COURT, and payment of purchase-money to him, form a sufficient consideration to support his express warranty of soundness. *Kearly v. Duncan*, 180.
8. WARRANTY BY COMMISSIONER SELLING UNDER ORDER OF COURT renders him personally liable. *Id.*

See CO-TENANCY, 15.

JURISDICTION.

NOTICE OF INSTITUTION OR PENDENCY OF SUIT, or appearance, which presupposes notice, is an indispensable prerequisite to the rendition of any judgment which the courts of another state are bound to recognize as conclusive. Without such service or appearance, the court obtains no jurisdiction. *Litchfield's Appeal*, 662.

See INSANITY; JUDGMENTS, 6, 16; PARTNERSHIP, 9; PROBATE COURTS.

JURY AND JURORS.

AFFIDAVITS OF JURORS SHOULD NOT BE RECEIVED TO IMPEACH THEIR VERDICT. *Little v. Birdwell*, 242.

See FRAUD, 4; MORTGAGES, 10; PLEADING AND PRACTICE, 12.

JUSTICES OF THE PEACE.

See JUDGMENTS, 5, 12.

JUSTIFICATION.

See CRIMINAL LAW.

LANDLORD AND TENANT.

1. EQUITY WILL ENJOIN LESSEE FROM SUBLETTING, ON GROUND OF FRAUD, where the lessee, who had occupied the premises during a former term as a drug store, obtained a new lease at the instance of the sublessees for the purpose of subletting the premises to them to use in retailing spirituous liquors, without informing the lessor of the use to be made of the premises, and knowing that the lessor would not rent them for that purpose. *Parkman's Adm'r v. Aicardi*, 457.
2. COMPENSATION FOR IMPROVEMENTS WILL NOT BE ALLOWED where they do not enhance the value of the land, and are made by a party holding possession under a void lease. *Vaughan v. Orvona*, 162.

See VENDOR AND VENDEE, 1.

LARCENY.

See CRIMINAL LAW, 11, 12.

LEADING QUESTIONS.

See WITNESSES, 11.

LEASES.

See CO-TENANCY, 2; EXECUTORS AND ADMINISTRATORS, 10; LANDLORD AND TENANT.

LEGATEES.

See EXECUTORS AND ADMINISTRATORS, 13; INJUNCTIONS, 2, 4; SET-OFF, 2; WILLS.

LEVY.

See ATTACHMENTS, 2-4.

LICENSES.

1. LICENSE IS AUTHORITY TO DO PARTICULAR ACT OR SERIES OF ACTS, upon another's land, without possessing any estate therein. *Rhodes v. O'Ne*, 439.
 2. PRIVILEGE OF FLOATING SPARS UPON PRIVATE STREAM, where it does not involve the holding or occupation of the real estate, is a license. *Id.*
 3. UNEXCUTED PAROL LICENSES ARE GENERALLY REVOCABLE, even when based upon a valuable consideration. *Id.*
 4. IT IS AGAINST ALL CONSCIENCE TO PERMIT PARTY TO REVOKE HIS LICENSE after the other party has acted upon it so far that damage would result from the revocation. *Id.*
 5. ESTOPPEL IN PAIS APPLIES WHERE PARTY WISHES TO REVOKE LICENSE to the great injury of the other party to the license. *Id.*
 6. CITY, BY GRANTING LICENSE TO CONDUCT BUTCHER BUSINESS AND LEASING BUTCHER'S STALL TO INDIVIDUAL in consideration of the payment of a rent and license tax, does not thereby contract to secure him against unlicensed competition, and its failure to enforce ordinances against carrying on the business without a license cannot be used as a defense to an action to recover the amount of the rent and license tax. *Peck v. Austin*, 261.
 7. LICENSE OR POWER CONFERRED BY STATUTE is only co-extensive with the sovereignty from which it emanates. *Upton v. Hubbard*, 570.
- See NUISANCE, 4.

LIENS.

1. LIEN GIVEN BY CONTRACT CANNOT BE ENLARGED SO AS TO SECURE ADDITIONAL INDEBTEDNESS, upon the ground that it was thus verbally agreed or understood. *Donald v. Hewitt*, 431.
2. PREFERENCE GIVEN BY FOREIGN STATUTE cannot operate to defeat liens acquired by virtue of attachments and libels in this state before it was set up. *Id.*
3. PRIVILEGE OF LIEN GIVEN BY FOREIGN STATUTE is a matter of personal privilege rather than a matter of contract. *Id.*
4. PRINCIPLE OF "COMITY" BETWEEN FOREIGN STATES does not extend to recognition of liens given by foreign law, when it would operate prejudicially to the rights of others in the country where such lien is asserted. *Id.*
5. LIENS GIVEN BY STATUTE IN ONE COUNTRY upon movables have no superiority to liens subsequently acquired in another country to which the movables are carried. *Id.*
6. THERE ARE GOOD REASONS WHY MARITIME LIENS SHOULD HAVE THEIR SUPERIORITY RECOGNIZED OVER DOMESTIC LIENS. *Id.*

7. SOUND PUBLIC POLICY DOES NOT REQUIRE THAT LIENS UPON BOATS NAVIGATING OUR INLAND RIVERS should have conceded to them a priority over other liens acquired in other states to which they may have been taken. *Id.*
 8. COMMON-LAW LIENS ARE MERE RIGHTS TO RETAIN PROPERTY until the specific debt is satisfied, and cannot continue without possession. *Id.*
 9. LIEN, UNDER OUR LAWS, has more extended signification than at common law. *Id.*
 10. TERM "LIEN" IS NOW USED TO DESIGNATE ALL VARIOUS CHARGES OF DEBTS UPON LAND OR PERSONALTY, created by statute or recognized in chancery and maritime law, although neither connected with nor dependent upon possession. *Id.*
 11. TERM "LIEN," IN COURTS OF EQUITY, IS USED TO DENOTE CHARGE OR INCUMBRANCE ON THING, where there is neither *jus in re* nor *jus ad rem*, nor possession of the thing. *Id.*
 12. TERM "LIEN" INCLUDES EQUITABLE MORTGAGE. *Id.*
 13. LIEN CREATED BY CONTRACT FOR SECURITY OF DEBT without possession of the goods has every characteristic of an equitable mortgage, and may be properly so denominated. *Id.*
 14. EVERY AGREEMENT FOR LIEN OR CHARGE IN REM CONSTITUTES TRUST, and is governed by the doctrine of trusts. *Id.*
 15. EVERY AGREEMENT FOR LIEN OR CHARGE IN REM IS CALLED EQUITABLE MORTGAGE, because courts of chancery, regarding them as trusts to be enforced, attach to them the incidents of a mortgage. *Id.*
 16. NON-CONFORMITY OF SECURITIES GIVEN TO THOSE CONTEMPLATED IN CONTRACT, and the blending in the same securities of an additional amount or debt to that for which the contract provided a lien would not destroy the lien so provided. *Id.*
 17. RELEASE BY NAKED TRUSTEE OF LIEN WHICH HE HOLDS FOR ANOTHER, to a person having knowledge of the character of the claim, is a nullity. *Lincoln v. Purcell*, 196.
- See BANKRUPTCY AND INSOLVENCY, 6; EQUITY, 9; INTERVENTION; PARTNERSHIP; SHIPPING, 3; STATUTE OF LIMITATIONS, 4-9; TRUSTS AND TRUSTEES; VENDOR AND VENDEE, 7-10.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LOST RECORDS.

See JUDGMENTS, 5.

LUNACY.

See INSANITY.

MARITIME LIENS.

LIENS, 6, 7.

MARKETS.

See CORPORATIONS, 22.

MARRIAGE AND DIVORCE.

1. MARRIAGE BETWEEN UNCLE AND NIECE IS VALID, at least to the extent that the wife may, after her husband's death, claim her distributive share of his estate. *Bowers v. Bowers*, 99.
2. MARRIAGE IS CIVIL CONTRACT IN SOUTH CAROLINA, and as such is not affected by canonical incapacity of the parties, arising from proximity of blood. *Id.*
3. COURTS CANNOT DECLARE MARRIAGE VOID IN SOUTH CAROLINA by direct proceedings for that purpose; but such courts have power when the question arises incidentally to determine the validity of a marriage. *Id.*
4. CRUELTY WITHIN MEANING OF DIVORCE LAW may be defined to be any conduct in one of the married persons which furnishes reasonable apprehension that the continuance of the cohabitation will be attended with bodily harm to the other. *Morris v. Morris*, 615.
5. COURTS GRANT DIVORCES FOR CRUELTY, NOT SO MUCH TO PUNISH OFFENSES already committed as to relieve the complaining party from an apprehended danger. *Id.*
6. CRUELTY AS GROUND FOR DIVORCE.—If an act is such as to create a reasonable apprehension that the continuance of cohabitation would be attended with bodily harm, it will justify a divorce, even in the absence of any proof of actual violence. The effect of an act of alleged cruelty is the criterion by which it must be tested. *Id.*
7. ACTUAL VIOLENCE AS CRUELTY.—When actual violence has been exercised by one married person towards the other, it is well settled that such violence, to authorize a divorce, must be attended with danger to life, limb, or health, or be such as to cause reasonable apprehension of future danger. *Id.*
8. ADULTERY BY INSANE PERSON IS NOT CAUSE FOR DIVORCE. *Nichols v. Nichols*, 352.

See WILLS, 16-18.

MARRIAGE SETTLEMENTS.

See HUSBAND AND WIFE.

MARRIED WOMEN.

1. DEED TO MARRIED WOMAN IS PRIMA FACIE VALID. *Morrison v. Wilson*, 594.
2. DEED TO MARRIED WOMAN PRIMA FACIE CREATES SEPARATE ESTATE IN HER, where it recites that the consideration was paid by another for her exclusive benefit. *Id.*
3. ALL PROPERTY ACQUIRED BY WIFE THROUGH GIFT REMAINS TO HER SEPARATELY, though under the management of the husband. *Dunham v. Chatham*, 228.
4. WIFE'S SEPARATE ESTATE, WHETHER LEGAL OR EQUITABLE, in the absence of statute, cannot be conveyed except by the joint deed of herself and husband. *Morrison v. Wilson*, 593.
5. DOCTRINE OF ESTOPPEL IN PAIS IS NOT APPLICABLE TO ESTATES OF MARRIED WOMEN. *Id.*
6. CALIFORNIA MARRIED WOMAN'S PROPERTY ACT OF 1850 is enabling only; and on conveyance by a married woman of her separate estate, title vests

in her grantee only on compliance with the mode of conveyance prescribed by statute, and the conveyance of a married woman, not executed in accordance therewith, is generally invalid. *Id.*

7. **FRAUD AFFECTS MARRIED WOMAN'S CONTRACT SO AS TO PREVENT THEIR ENFORCEMENT**, but not so that a fraudulent representation will divest the woman's title, in the face of a statute declaring a different and exclusive mode of divestiture. *Id.*
8. **WHERE LAND IS BOUGHT FOR MARRIED WOMAN, AND DEED TAKEN IN NAME OF ANOTHER**, under an executory agreement on the part of the latter to convey to her on the payment of a certain sum, and she goes into possession, her entry is under a claim of right, with a vested equitable interest in the land, which, on payment of the sum agreed, becomes a perfect equity. And if the married woman, before the payment of said money, acquires the real title from a different source, the first deed being from parties without title, such real title is not divested in favor of the vendee or mortgagee of such third person, because she holds the inferior title from him, or claimed or entered under such title. *Id.*
9. **TITLE OF MARRIED WOMAN CANNOT BE DIVESTED** by an estoppel based on the fact that she took or claimed possession under a bad title. *Id.*
10. **AUTHORITY CONFERRED UPON MARRIED WOMAN TO LITIGATE IN HER OWN RIGHT** implies the capacity on her part to conduct the litigation as shall be most conducive to her own advantage. It is a consequence of this right that she must be held to the use of the ordinary diligence of other suitors, where she is not specially exempted by law from the use of such diligence. *Cayce v. Powell*, 211.
11. **MARRIED WOMAN EMPOWERED BY STATUTE TO SUE AND BE SUED**, who has been made a party to a suit, and been personally served with process, and who has appeared by attorney, is bound to inform herself of the result of the suit, and cannot make any want of information a ground for enjoining the judgment, such as that by arrangement between defendant and her husband her answer had been withdrawn, and judgment had gone against her by default, of which she had had no notice until this proceeding was brought. *Id.*

See HUSBAND AND WIFE; POWERS.

MERGER.

See CONTRACTS, 1; JUDGMENTS, 85.

MILLS.

See DAMAGES, 1.

MINING.

See PLEADING AND PRACTICE, 2.

MISTAKE.

MISTAKE IN VOLUNTARY DEED OF MOTHER TO CHILD, whereby she conveyed to the child the half of lot No. 158, when she intended to convey the half of lot No. 157, cannot be corrected at the instance of said child after the death of the mother, intestate, leaving this and other children. *Powell v. Powell*, 724.

See ARBITRATION AND AWARD, 1, 3; EQUITY, 8; ESTOPPEL; EXECUTIONS, 28; NEGOTIABLE INSTRUMENTS, 14, 15.

MONEY.

See CRIMINAL LAW, 11.

MORTGAGES.

1. **WHAT CONSTITUTES MORTGAGE.**—In every mortgage, however we regard it in relation to the nature of the estate created thereby, there is a right after condition broken to a foreclosure on the part of the mortgagee and a right of redemption on the part of the mortgagor. These two rights are mutual and reciprocal. When one cannot be enforced, the existence of the other is denied, and when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage. *Koch v. Briggs*, 651.
2. **AGREEMENT THAT BILLS SHALL BE PAID OUT OF PROCEEDS OF CERTAIN PROPERTY CREATES EQUITABLE MORTGAGE.** *Donald v. Hewitt*, 431.
3. **CHARGE OF EQUITABLE MORTGAGE**, like other equities, is maintainable except against innocent purchasers for value without notice. *Id.*
4. **PRIOR OUTSTANDING MORTGAGE IN THIRD PARTY** is only a pledge of land as security for a debt, and is to be regarded as a legal title in the mortgagee, or his assignee, only for the purpose of enforcing payment, and when another who has no interest in the debt attempts to set it up for his own benefit, this is in fraud of the purpose for which it was given. *Savage v. Dooley*, 680.
5. **AS BETWEEN MORTGAGOR AND MORTGAGEE**, the legal title is in the mortgagee, even in case of satisfied mortgages, provided they were not paid until after the expiration of the law day. *Id.*
6. **MORTGAGE NOT ACKNOWLEDGED, PROVED, AND RECORDED**, as required by statute, though good between the parties, is not valid as against subsequent purchasers or incumbrancers with actual notice of the existence of the mortgage. *Jacoway v. Gault*, 494.
7. **SUBSTANTIAL COMPLIANCE WITH WHAT STATUTE REQUIRES TO BE DONE** ought affirmatively to appear from a certificate of acknowledgment of a mortgage. Although a literal compliance with the statute is not required, words of similar import must be employed. *Id.*
8. **COURTS CANNOT DISPENSE WITH SUBSTANTIAL COMPLIANCE WITH STATUTE**, and by intendment supply important words omitted in the certificate of acknowledgment of a mortgage. Thus, where the statute requires that the certificate contain the words "for the consideration and purposes therein set forth," their omission will render the certificate void. *Id.*
9. **EXECUTION BY OWNER OF LAND OF NEW MORTGAGE TO PERSONS WHO PAY OFF PRIOR MORTGAGES** upon their being released, such execution and release taking place on the same day, operates in equity as an assignment of the old mortgages in consideration of the money advanced by the second mortgagees, and is not the creation of a new incumbrance, but changing the form of the old. Therefore, if after the execution of the first mortgage, but before executing the second, the mortgagor married, and the second mortgage was not signed by his wife, neither he nor his grantor, after his wife's death, can claim and hold the property free of the second mortgage, on the ground that the property became homestead property on the mortgagor's marriage, and was not subject to be incumbered by such second mortgage. *Swift v. Kraemer*, 603.

10. VERDICT WHICH DOES NOT REFER TO MORTGAGE IN ACTION UPON NOTES AND TO FORECLOSURE MORTGAGE, securing the same, leaves it doubtful if the jury passed upon the mortgage, and is defective. *Barnett v. Caruth*, 255.
 11. WHERE CERTAIN PROPERTY OF MORTGAGOR IS ERRONEOUSLY SUBSTITUTED IN FORECLOSURE DECREE against him, in lieu of a part of the property described in his mortgage, to which his title had failed, under an execution issued on this decree, a sale of the property described in the mortgage alone is proper. Consequently, where the sum realized from this sale is insufficient to satisfy the decree, and execution is issued and levied upon other property of the mortgagor, it cannot be objected to the title of the purchaser thereunder that the property described in the decree had not been exhausted and found insufficient. *Castro v. Illies*, 277.
 12. EVIDENCE IS ADMISSIBLE, and not open to the objection that it contradicts the record, in case of a bill to obtain an extension of time in which to redeem a mortgage, but not taking notice of a previous decree of foreclosure; where defendants set up such decree and aver that it was rendered upon legal notice to plaintiffs, and with their knowledge and acquiescence, plaintiffs may offer evidence to negative these allegations, and to show that there was no legal notice, nor actual knowledge of the suit. *Bridgeport Savings Bank v. Eldredge*, 688.
 13. WHERE DECREE OF FORECLOSURE IS INTERPOSED BY PARTY OBTAINING IT as an objection to a redemption, which, but for the effect of the decree, would be just and reasonable, its irregularity, as well as any other circumstance which ought to set it aside or modify it, will be considered on the question whether the time for redemption shall be further extended. And the validity of the decree, in such case, is gone into, not as a technical question of evidence, but as being of itself a ground of relief to the party seeking to redeem. *Id.*
 14. EQUITY OF REDEMPTION.—Equity of redemption is enforced in case of mortgage to give effect to the intent of the parties against the legal consequences of the form of their undertaking, it being in form a conveyance, while in truth it is only a contract of security. The case is different with a trust deed. In the performance of the trust, the contract of the parties, in fact and in intention, is carried out. *Koch v. Briggs*, 651.
 15. SECOND MORTGAGEES HAVING ACQUIRED BY FORECLOSURE the right to redeem mortgaged premises have such right after the time allowed for redemption has expired, notwithstanding a decree of foreclosure, obtained without service of process or legal notice to them, by the defendants, who by purchase represent the interest of the first mortgagee. *Bridgeport Savings Bank v. Eldredge*, 688.
 16. EQUITY POSSESSES POWER OF OPENING DECREE OF FORECLOSURE and extending further time for the redemption of a mortgage. *Id.*
- See EJECTMENT, 2; FRAUDULENT CONVEYANCES, 6; HOMESTEADS, 1; INTERVENTION; LIENS, 12, 13; PARTNERSHIP, 4, 6; TRUSTS AND TRUSTEES; VENDOR AND VENDEE, 6, 7.

MULTIFARIOUSNESS.

See EQUITY, 10.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 20-22; HIGHWAYS; LICENSES, 6.

MURDER.

See CRIMINAL LAW, 6-10.

NAVIGABLE WATERS.

See WATERCOURSES.

NECESSARIES.

See HUSBAND AND WIFE, 2-5; PARENT AND CHILD, 1.

NECESSARY PARTIES.

See ARBITRATION AND AWARD, 4; INTERVENTION, 5.

NEGLIGENCE.

CHARGE TO JURY THAT "GROSS NEGLIGENCE WAS SUCH WANT OF CARE AS almost evinces a fraud, and such a degree of negligence as would rather invite depredation upon property than tend to protect it," although, perhaps, too strong in its language, can hardly be considered error. *Marshall v. American Exp. Co.*, 381.

See ANIMALS; ATTACHMENTS, 20-22; COMMON CARRIERS, 2, 9; EQUITTY, 2, 4, 5; FERRIES; HIGHWAYS, 3; INNS; RAILROADS; SHERIFFS; TELEGRAPH COMPANIES; WATERCOURSES, 9, 10.

NEGOTIABLE INSTRUMENTS.

1. WHERE SHERIFF'S TAKING OF PRISONER'S NOTE VIOLATES NO STATUTE, is not taken to stifle prosecution, and in no way compromises the ends of public justice, the note must be held valid even in the hands of the sheriff, and much more so in the hands of a *bona fide* indorsee. *St. Albans Bank v. Dillon*, 295.
2. PROMISSORY NOTE MADE BY PRISONER IN FAVOR OF SHERIFF, WHO IS ALSO JAILER, for payment of fine and costs, is not void as against public policy. *Id.*
3. PARTY SIGNING PROMISSORY NOTE WITH ADDITION OF WORD "TRUSTEE" TO HIS NAME IS PERSONALLY LIABLE; nor is evidence admissible to show that at the time the note was made there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund. *Conner v. Clark*, 529.
4. NOTE DISCOUNTED BY CASHIER OF BANK WHERE IT IS MADE PAYABLE, and indorsed by him in the name of the bank, is a sufficient adoption of the note by the bank to render it binding on all parties to the contract. *Keith v. Goodwin*, 345.
5. NAMING BANK AS PAYEE OF NOTE IS MERELY FORMAL, and not a substantial part of the contract, where the note is executed for the purpose of raising money. *Id.*
6. PRINCIPAL MAY PROCURE ADDITIONAL SURETIES AS JOINT MAKERS OR GUARANTORS, indefinitely, until the note is fairly launched in the market as a security, if it have two distinct parties, without affecting the obligation of the first signers. *Id.*

7. GUARANTOR OF NOTE ALREADY SIGNED BY SURETIES is *prima facie* surety for them, and not surety with them. *Id.*
8. GUARANTOR OF NOTE SIGNED BY SURETIES, but appearing as principals, is, when obliged to pay the note, entitled to recover the full amount from the sureties, unless it be shown that the guarantor signed as a general surety, intending to be liable to contribution with them. *Id.*
9. ORDER POSSESSES ALL REQUISITES OF INLAND BILL OF EXCHANGE when it directs a certain person to "please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account." *Wheatley v. Strobe*, 522.
10. USE OF WORD "PLEASE" WILL NOT ALTER CHARACTER OF INSTRUMENT otherwise a bill of exchange. *Id.*
11. VERBAL ACCEPTANCE OF BILL OF EXCHANGE IS INSUFFICIENT to charge the person to whom it is addressed as an acceptor, under the California statute concerning bills of exchange. *Id.*
12. SUFFICIENCY OF NOTICE UNDER LAW MERCHANT. — Notice deposited in the proper post-office, within the proper time, and with the proper direction, is *per se* notice to a party to a commercial instrument, whether it ever be received or not. The notice must go at the risk of the indorser. The postmaster in such a case becomes in effect the agent of the party to whom the notice is sent. *Walworth v. Seaver*, 332.
13. SUFFICIENCY OF NOTICE UNDER COMMON-LAW PRINCIPLES. — Notice deposited in the proper post-office, within the proper time, and with the proper direction, is only *prima facie* evidence of notice to the one to whom the notice is sent; and it may be shown that no notice was ever actually received. This is a question for the jury. The notice must go at the risk of the sender; and the postmaster, in effect, is his agent for the safe delivery of the notice. *Id.*
14. SURRENDER OF NOTE BY MISTAKE—MAKER'S LIABILITY.—The maker of a note who surrenders it to be canceled before maturity is restored to his original liability on the note, if, before maturity, the consideration on which the note was surrendered fails, or the source fails from which the parties contemplated the note would be paid. *Blodgett v. Bickford*, 334.
15. SURRENDER OF NOTE BY MISTAKE—SURETY'S LIABILITY.—The surety of a note surrendered by mistake to be canceled before maturity is still liable to the payee, where the latter, before maturity, notifies the surety of the mistake, and that he still looks to him for payment; provided the surety has not, prior to such notice, and relying upon the surrender of the note, relinquished securities held by him to protect his liability upon the note. It seems, too, that where the legal relations between the surety and principal have not been changed or prejudiced, the payee may, under such circumstances, enforce the note, when due, against the surety, without notice of the mistake. *Id.*
16. PROMISSORY NOTE INDORSED OVER AS COLLATERAL SECURITY FOR PRE-EXISTING DEBT is, if received by the creditor before the maturity of such note, and without notice, indorsed for a valuable consideration in the usual course of business, and may be held discharged of the equities between the original parties thereto. *Bank of the Republic v. Carrington*, 83.
17. NOTE PAYABLE IN STONE-WORK, TO BE DONE AT ANY TIME CALLED FOR, cannot be sued on without a previous request to do the work. *Lincoln v. Purcell*, 196.

1. ANSWER CONSISTING OF GENERAL DENIALS WITHOUT VERIFICATION ADMITS GENUINENESS and due execution of a note sued on, where a copy of such note is attached to and made part of the complaint. *Horn v. Volcano Water Co.*, 569.

See ASSIGNMENT OF CONTRACTS; ATTACHMENTS, 6, 11, 12, 14; CONFLICT OF LAWS, 2; CRIMINAL LAW, 1; HUSBAND AND WIFE, 11, 12; PAYMENT, 4-6; STATUTE OF LIMITATIONS, 2, 10.

NEW TRIAL

1. NEW TRIAL WILL BE GRANTED UPON CONTRADICTORY VERDICT, it seems, showing that other counts were considered besides those upon which the verdict purports expressly to be found. *Ryan v. Copes*, 106.

2. NEW TRIAL WILL BE GRANTED if material allegations are not proved. *Id.*
See PLEADING AND PRACTICE, 22, 25.

NON-NEGOTIABLE NOTES.

See NEGOTIABLE INSTRUMENTS, 17; STATUTE OF LIMITATIONS, 2.

NOTES.

See NEGOTIABLE INSTRUMENTS.

NOTICE.

1. POSSESSION OF REAL ESTATE, OPEN AND NOTORIOUS, BY ONE HOLDING UNRECORDED DEED, is evidence of notice to a subsequent purchaser of the first grantee's title; but the possession must exist at the time of the acquisition of title or deed of the subsequent grantee from the common grantor. *Hunter v. Watson*, 543.

2. POSSESSION OF LAND IS NOTICE OF EQUITIES under which party holds. *Morrison v. Wilson*, 594.

3. PLEA THAT "PLAINTIFF DID NOT NOTIFY DEFENDANT" fails to negative notice to the defendant. *Moore v. Appleton*, 448.

4. IN EQUITY, WHATEVER IS SUFFICIENT TO PUT PARTY UPON INQUIRY is sufficient to charge him with notice of facts which due inquiry would have elicited; so where such party is chargeable with knowledge of a decedent's insanity and incapacity, of his abundant property within the state, and of his subjection there to the guardianship of a conservator, these facts are sufficient to put such party upon inquiry, and to justify equity in restraining the enforcement of a judgment not impeachable at law. *Litchfield's Appeal*, 662.

See AGENCY, 1; BONA FIDE PURCHASERS; JURISDICTION; NEGOTIABLE INSTRUMENTS; PLEADING AND PRACTICE, 6; SHIPPING, 3; SURETYSHIP, 4, 5, TREMPASS, 7.

NUISANCE.

1. PUBLIC NUISANCE IS SUBJECT OF INDICTMENT, NOT OF ACTION. *S. C. R. R. Co. v. Moore*, 778.

2. PERSON SUFFERING PARTICULAR DAMAGE FROM PUBLIC NUISANCE MAY HAVE PRIVATE ACTION. *Id.*

3. ACTION FOR NUISANCE MAY BE MAINTAINED by one exposed to peculiar danger from the chance of the evil, and hurtful consequences thence resulting to him, without ever having endured the actual occurrence of the threatened evil. *Ryan v. Copes*, 106.

4. LICENSE BY CITY TO ERECT STEAM COTTON-PRESS IS NOT CONCLUSIVE that it is not a private nuisance, although the license is entitled, as evidence, to high consideration. *Id.*
5. PROOF OF DECLARATIONS OF DECEASED WIFE is competent to show that she complained of offensive smells from nuisances while suffering from them, and during the time mentioned in the declaration; the witnesses testifying that the offensive smells were also perceived by them. *Kearney v. Farrell*, 677.
6. PARTY MAY RECOVER NOT ONLY FOR INJURIES DONE to himself by a nuisance, but also for those done to his family, and when the declaration contains averments of such injuries, evidence to prove them is admissible. *Id.*

See WATERCOURSES, 11, 12; WITNESSES, 2.

NUNC PRO TUNC.

See JUDGMENTS, 6.

OFFICES AND OFFICERS.

See ATTACHMENTS, 20-22; BANKS AND BANKING, 2; CORPORATIONS, 20; RECORDS, 2; SHERIFFS; SURETIES.

ORDERS.

See ASSIGNMENT OF CONTRACTS.

ORPHANS' COURT.

See PROBATE COURTS.

PARENT AND CHILD.

1. FATHER'S OBLIGATION TO PROVIDE FOR HIS CHILD IS NOT AFFECTED BY HIS WIFE'S MISCONDUCT, and if he suffers the child to live with her separate from him, he thereby constitutes her his agent to contract for the child's necessities, and will be liable to those who furnish them upon his credit. *Gill v. Read*, 73.
2. HUSBAND HAS NO CLAIM UPON BUILDING OR ITS PROCEEDS, which he deliberately places upon the lands of his minor children by a former marriage, during the existence of the community. The character of the building as common property is declared only for the protection of the interest of the wife. *Smith v. Smith*, 533.

See HOMESTEADS, 2; MISTAKE; SEDUCTION.

PAROL CONTRACTS.

See NEGOTIABLE INSTRUMENTS, 2.

PAROL EVIDENCE.

See CONTRACTS; EVIDENCE; HUSBAND AND WIFE, 24, 25; SUBSCRIPTIONS; WILLS, 7.

PARTIES.

See ARBITRATION AND AWARD, 4; CO-TENANCY, 10; EQUITY, 14; INTERVENTION, 5; TRESPASS, 7; WITNESSES, 2.

PARTITION.

See CO-TENANCY, 13-15.

PARTNERSHIP.

1. **EQUALITY AMONG PARTNERS—PARTNER'S LIEN UPON PARTNERSHIP LANDS.**
Partners in lands have an equity against each other for the purpose of producing equality among themselves. This equity fastens itself to, and is a lien upon, their respective interests in the partnership lands; and neither partner, nor a creditor of his, nor a purchaser from him with notice, can deprive his copartner of such lien. *Williams v. Love*, 191.
2. **PARTNER'S LIEN UPON PARTNERSHIP LANDS MAY BE ENFORCED BY HIS PERSONAL REPRESENTATIVES** after his death, where inequality between the partners, or indebtedness from one to the other, arose from transactions occurring in the life-time of such partner; as it is immaterial whether the amount of such inequality or indebtedness was ascertained at the death of the partner in whose favor this inequality existed. *Id.*
3. **OWNER OF LEGAL TITLE TO PARTNERSHIP LANDS CANNOT BE FORCED TO PART WITH IT** until the copartner's debt to him is paid, and he is freed from liability for him. If two persons are joint owners of lands—one having the legal title, the other a mere equity in the land—and the latter is indebted to the former, the one who has the legal title cannot be forced to part with it until his debt is discharged and he is freed from liability for his copartner. *Id.*
4. **PURCHASER, MORTGAGEE, OR ATTACHING CREDITOR OF EQUITABLE INTEREST IN PARTNERSHIP LANDS** must take it incumbered with the equity existing against the person having such equitable interest; for the purchaser of an equitable title must always abide by the case of the person from whom he buys. *Id.*
5. **PERSONAL REPRESENTATIVE, HEIRS, OR DEVISEES OF ONE HOLDING LEGAL TITLE, AND EQUITABLE LIEN ON PARTNERSHIP LAND** for satisfaction of indebtedness to him, may enforce such equitable lien, if the party holding it dies before its enforcement. *Id.*
6. **EFFECT OF MORTGAGE OF EQUITABLE INTEREST IN PARTNERSHIP LAND BECOMING INDEBTED TO HOLDER OF LEGAL TITLE.**—Where the holder of an equitable interest in partnership land mortgages it to a third person, and the mortgagee becomes indebted to the holder of the legal title, and assigns his claim upon the mortgagor, together with his lien, the land becomes subjected to an additional equity against the mortgagee by reason of his indebtedness, and his assignee, occupying the same ground, must yield to the superior equity of the person holding the legal title. *Id.*
7. **PARTNERS MAY MAKE BONA FIDE SALE OF THEIR PROPERTY** at any time before their creditors acquire a lien; but a sale directly or indirectly to one of the partners, with a stipulation that he will pay the firm debts, is not such a *bona fide* sale so as to divest the property of its character as firm property, primarily liable for firm debts. *Conroy v. Woods*, 605.
8. **INDIVIDUAL CREDITOR OF PARTNER OBTAINS NO PRIORITY OVER FIRM PROPERTY**, by the fact that he obtains judgment, issues execution, and levies thereon, as against firm creditors who have not yet obtained judgment. *Id.*

9. EQUITY HAS JURISDICTION OF CONFLICT BETWEEN INDIVIDUAL AND FIRM CREDITORS. *Id.*
10. LIEN OF FIRM CREDITORS ON FIRM PROPERTY IS PARAMOUNT to that of individual creditors, though the latter attached first. *Id.*
11. WHERE PARTNER BUYS INTEREST OF COPARTNERS IN FIRM, agreeing to pay the firm debts, the property of the firm remains bound for such debts just as before the sale. *Id.*
12. ONE PARTNER HAS RIGHT TO INCUMBER ENTIRE INTEREST IN PERSONAL PROPERTY OF PARTNERSHIP for the security of the debts. *Donald v. Hewitt*, 431.
13. UPON VOLUNTARY DISSOLUTION OF PARTNERSHIP, it is competent for the partners to agree that the joint property shall belong to one of them; and if this agreement be *bona fide*, and for a valuable consideration, it will transfer the whole property to such partner, free from the claims of the partnership creditors. *White v. Parish*, 204.
14. PARTNERSHIP CREDITORS HAVE NO EQUITY, STRICTLY SPEAKING, AGAINST PARTNERSHIP EFFECTS, nor have they a lien on the partnership effects for their debts. All they can do is to prosecute their claims to judgments against the partners, and procure executions to be issued thereupon, to be levied upon the partnership effects, upon the separate effects of each partner, or upon both. *Id.*
15. WHERE ONE PARTNER SELLS HIS INTEREST IN PARTNERSHIP TO HIS COPARTNER, upon consideration that the latter pay all the partnership debts, and upon other consideration, such property becomes the separate property of the copartner. Upon his death it goes to his administrator, and the seller cannot claim it as surviving partner, to be used in paying partnership debts which he was forced to pay. His remedy is against his deceased partner's estate under the agreement. *Id.*

See CORPORATIONS, 11; EXECUTIONS, 25; SHIPPING.

PAYMENT.

1. AGREEMENT TO PAY IN SPECIFIC ARTICLES AT TIME FIXED compels debtor to become the first actor, and to tender the articles to save himself from default. *Deel v. Berry*, 236.
2. WHERE PONDEROUS ARTICLES ARE TO BE DELIVERED BY PROMISOR AT TIME SPECIFIED, but place unknown, he must request the promisee to designate a convenient place of delivery. *Id.*
3. IF DEBT IS TO BE PAID IN SERVICES, AND TIME OF PERFORMANCE IS SPECIFIED, the promisor must be the first actor. *Id.*
4. WHERE NOTE IS TO BE PAID BY CERTAIN DAY IN SERVICES OR MONEY, the maker has until the maturity of the note to make his election, but if not then made, he becomes liable as for a demand in money. *Id.*
5. WHAT CONSTITUTES PAYMENT UPON WIFE'S NOTE.—Where husband and wife deed away wife's land, receive therefor a promissory note, and the wife agrees, with the husband's assent, that the makers of the note shall furnish her family with goods and apply them upon the note, articles delivered to the family, under this agreement, constitute a payment upon the note; but not so as to goods delivered under the husband's order to persons not members of the family. *Barber v. Slade*, 299.
6. BURDEN OF PROOF UNDER AGREEMENT THAT MAKERS OF PROMISSORY NOTE SHALL FURNISH GOODS for family use, and to be applied in payment

thereof, is on the makers, when sued, to show what goods were delivered for such use. *Id.*

See CONFLICT OF LAWS, 2; EXECUTIONS, 28; STATUTE OF LIMITATIONS, 10.

PERSONAL REPRESENTATIVES.

See EXECUTORS AND ADMINISTRATORS.

PILOT.

See WITNESSES, 4.

PLEADING AND PRACTICE.

1. CALIFORNIA PRACTICE ACT GOVERNS ALL CASES, LEGAL AND EQUITABLE, by the same rules, at least in regard to evidence necessary to sustain the pleadings. *Goodwin v. Hammond*, 574.
2. MISJOINDER OF CAUSES OF ACTION DOES NOT EXIST where the complaint asks damages for the immediate injury to a mining claim caused by the breaking of a dam, and for the consequent preventing the plaintiffs from working the claim. *Fraler v. Sears Union Water Co.*, 562.
3. WHEN SUITS ARE PENDING IN DIFFERENT STATES UPON SAME CAUSE OF ACTION, plaintiff must elect in which state he will proceed to final judgment. *Bank of North America v. Wheeler*, 683.
4. PROOF OF SERVICE OF COMPLAINT.—Where the sheriff's return states that he served the defendant with a certified copy of the complaint, this is sufficient to support a judgment by default. It cannot be argued that this does not show that the copy was certified by the clerk; he being the only person who could legally make the certificate, it must be presumed, in favor of the officer who has the general power of making service, that he discharged his duty in the legal mode. *Curtis v. Herrick*, 632.
5. REQUEST TO JOIN IN COMMISSION TO TAKE TESTIMONY IS NOT OFFER OF DEFENSE of the suit, to the person of whom such request is made. *Adams v. Filer*, 410.
6. NOTICE APPENDED TO GENERAL ISSUE IS GOOD ONLY FOR PARTICULAR PURPOSE for which the statute allows it to be filed; it is not binding as an admission upon the party filing it, and has no other effect upon the opposite party than to allow the matters of which it gives notice to be given in evidence. *Id.*
7. PLEA PUIS DARREIN CONTINUANCE IS NOT BAD UNDER ALABAMA CODE as professing to be in bar of the entire action, when in fact it goes only to the further maintenance of the action, if the plea is "in short by consent," and does not in terms propose to bar the entire suit, but simply sets out the facts. *Broughton v. Bradley*, 474.
8. DEFENDANT, BY PLEADING PUIS DARREIN CONTINUANCE, WAIVES ALL OTHER PLEAS, and admits the cause of action as set out in the plaintiff's declaration. *Adams v. Filer*, 410.
9. UNDER PLEA OF TOTAL FAILURE OF CONSIDERATION, DEFENDANT MAY SHOW PARTIAL FAILURE, in Texas. This is not the rule in England, and in some of the states of the Union, but it is so here by virtue of the statute. *Brantley v. Thomas*, 264.
10. ERROR IN STRIKING OUT GOOD PLEA IS CURED if the defendant is afterwards allowed to avail himself fully of all the matters of defense on which he saw fit to rely. *Sanders v. Young*, 175.

11. **VARIANCE BETWEEN DECLARATION AND PROOF**, where defendants are charged with obstructing and turning a watercourse on plaintiff's land, and the proof is that defendants allowed their ditch to become so filled up as to throw an accumulation of water on plaintiff's land, is not so great but, by amendment, plaintiff's declaration might be made to cover all the facts. *Waterman v. Connecticut etc. R. R. Co.*, 326.
12. **STATEMENT OF FACTS IN CIVIL CASE MAY BE PREPARED AND CERTIFIED IN VACATION**, when counsel so agree, and the approval of the court is obtained. *McCown v. Schrimpf*, 221.
13. **PARTY HAS RIGHT TO HAVE JURY PASS UPON ALL ALLEGATIONS** contained in the declaration, and he is entitled to their verdict if he sustains by his proof any of the allegations showing a cause of action. *Kearney v. Farrell*, 677.
14. **WHERE ACTION WAS COMMENCED AGAINST DOE, ROE, ETC., BUT SERVICE WAS HAD UPON OTHERS**, whose names are indorsed upon the writ, judgment by default may be entered against the latter. After service had upon them in this way, their failure to appear or defend was equivalent to an admission that they were the persons intended to be sued. *Curtis v. Herrick*, 632.
15. **WHERE JUDGMENT IS IMPROPERLY ENTERED FOR DAMAGES, SAME MAY BE REMITTED**, and the remainder of the judgment stand. *Id.*
16. **PARTY HOLDING AFFIRMATIVE OF ISSUE HAS RIGHT TO OPEN AND CLOSE** the argument to the jury. The strict rule on this subject is for the party holding the affirmative to open his case, stating and maintaining his several points by reference to such evidence as tends to sustain them, together with the points of law and a reference to the authorities; then for the other side to answer, and illustrate and establish his defense, combating the positions assumed by his adversary, and assuming others of his own; and afterward for the party holding the affirmative simply to reply to what has been said on the other side, confining himself strictly in his reply to what has been urged by his opponent. But this rule is not always observed in practice, and a departure from it can hardly be assigned for error. Matters of this kind are generally under the control of the judge, and rest mainly in his sound discretion, and unless it is clear that he has abused that discretion, the fact that he may have made a mistake affords no ground for reversing the judgment. *Marshall v. Am. Exp. Co.*, 381.
17. **ABSTRACT CHARGES SHOULD BE REFUSED BY COURT.** *Gunn v. Howell*, 484.
18. **INSTRUCTION SUBSTANTIALLY EMBRACED IN GENERAL CHARGE**, or one which is abstract and not warranted by the evidence, should be refused. *McCown v. Schrimpf*, 221.
19. **WHERE THERE IS NO TENDENCY OF PROOF TO CONCLUSION FROM CONFLICTING EVIDENCE**, it is certainly a right of the parties to have from the court a declaration of the legal effect of the evidence. *Rhodes v. Otis*, 439.
20. **COURT IS NOT BOUND TO CHARGE JURY AS TO LEGAL EFFECT OF ENTIRE EVIDENCE**, unless, after concession of all points upon which there was a conflict of evidence, the party asking the charge is entitled thereto. *Id.*
21. **COURT MAY PROPERLY DECLINE TO CALL ESPECIAL ATTENTION OF JURY TO PARTICULAR PART OF EVIDENCE**, by instructions as to the weight to

which it is entitled, or the purposes for which it may be considered by them. *Castro v. Illies*, 277.

82. WHERE PLAINTIFF SEEKS TO RECOVER ON DOUBLE GROUND, and it is not known upon which ground a verdict was found for him, the appellate court will grant the defendant a new trial for misdirection in matter of law touching either ground of liability. *Gill v. Read*, 73.
 83. APPEAL BY WRIT OF ERROR DOES NOT VACATE OR SUSPEND JUDGMENT appealed from either in New York or Connecticut. Therefore a judgment obtained in either state is, pending appeal, a bar to the prosecution of the same cause of action, between the same parties, in the other state. *Bank of North America v. Wheeler*, 683.
 84. ERROR CANNOT BE PRESUMED, BUT MUST AFFIRMATIVELY APPEAR, and where the refusal of the court to charge the jury as requested is assigned as error, and the evidence upon which the charge was asked is not before the appellate court, it will presume that the refusal was correct, and warranted by the evidence. *O'Malley v. Dorn*, 403.
 85. MOTION FOR NEW TRIAL IS NOT NECESSARY to entitle plaintiff in error to a revision of a judgment, where a jury trial had been waived, and the case submitted to the court. *Bell County v. Alexander*, 268.
 86. WHERE DEFECT IS RADICAL, GOING TO VERY FOUNDATION of the action, where the error in the decree is apparent by reference to the bill and the decree, the aggrieved party may assign error, although no demurrer has been interposed. *Gregory v. Ford*, 639.
 87. ERROR MUST BE APPARENT FROM BILL OF EXCEPTION. *Johnson v. Lightsey*, 450.
 88. ADMISSION OF EVIDENCE WHICH MIGHT HAVE BEEN RELEVANT TO QUESTION INVOLVED is not error unless the bill of exceptions negatives the existence of circumstances making it relevant. *Id.*
 89. EXECUTION AND LEGALITY OF BILL OF EXCEPTIONS MUST BE TESTED by the law in force at the commencement of the suit. *Moore v. Appleton*, 443.
- See AGENCY, 4; ARBITRATION, 1; AWARD, 4; ATTACHMENTS, 15; CO-TENANCY, 10; CRIMINAL LAW; EQUITY; EXECUTIONS; INTERVENTION; JUDGMENTS; NEGOTIABLE INSTRUMENTS, 18; NEW TRIAL; NOTICE, 3; RAILROADS, 15, 17-19; RECEIVERS; REFERENCE; SALES; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; SET-OFF; TRESPASS, 7; WILLS, 2.

PLEAS.

See PLEADING AND PRACTICE.

PLEDGE.

See BAILMENTS.

POSSESSION.

See ADVERSE POSSESSION; EJECTMENT; INJUNCTIONS, 1; NOTICE; VENUE AND VENDOR.

POWERS.

1. APPOINTMENT WILL BE DECLARED VOID where one clothed with a discretionary power, in order to secure advantage to the trustee himself, or to a stranger, makes discriminations among a class of the objects of the

11. **VARIANCE BETWEEN DECLARATION AND PROOF**, where defendants are charged with obstructing and turning a watercourse on plaintiff's land, and the proof is that defendants allowed their ditch to become so filled up as to throw an accumulation of water on plaintiff's land, is not so great but, by amendment, plaintiff's declaration might be made to cover all the facts. *Waterman v. Connecticut etc. R. R. Co.*, 326.
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PLEAS.

See PLEADING AND PRACTICE.

PLEDGE.

See BAILMENTS.

POSSESSION.

See ADVERSE POSSESSION; EJECTMENT; INJUNCTIONS, 1; NOTICE; VENDOR AND VENDER.

POWERS.

1. APPOINTMENT WILL BE DECLARED VOID where one clothed with a discretionary power, in order to secure advantage to the trustee himself, or to a stranger, makes discriminations among a class of the objects of the

power. *Quere*: If fraud intervenes in the exercise of a power of appointment, does it vitiate the entire acts of the trustee, or only such appointments as are fraudulent? *Cruse v. McKee*, 186.

2. APPOINTMENTS OF WIFE IN CONFORMITY WITH POWER CONFERRED UPON HER ARE NOT VOID because others, invalid, are included in her will. Those in accordance with the power will be sustained; others will be rejected. *Id.*
3. PROPERTY NOT DISPOSED OF IN CONFORMITY WITH POWER UNDER WILL MUST PASS AS VESTED REMAINDER under the will, and be distributed equally to all the objects of the power, the testator's children in this case, the representatives taking a share of a deceased child, without regard to the property held under the valid appointments of the wife. It is not a case for collation of advancements, as in intestacy. *Id.*
4. VALID APPOINTMENT WILL BE MAINTAINED, though embraced in the same deed or will with others not valid. *Id.*
5. ONE CLOTHED WITH POWER OF APPOINTMENT MUST EXERCISE IT IN GOOD FAITH for the end and purpose designed. *Id.*

See BAILMENTS, 2; AGENCY, 2; LICENSES; WILLS, 20-22.

POWERS OF ATTORNEY.

See AGENCY, 2.

PRACTICE.

See PLEADING AND PRACTICE.

PREFERENCES.

See LIENS.

PRESCRIPTION.

See ADVERSE POSSESSION; STATUTE OF LIMITATIONS; WATERCOURSE, 2.

PRESUMPTIONS.

See ATTACHMENTS, 14; CORPORATIONS, 12; EQUITY, 20; FRAUDULENT CONVEYANCES, 5; INNS, 3; JUDGMENTS, 5, 6; HUSBAND AND WIFE; VENDOR AND VENDEE, 10; WITNESSES, 3.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT, 1, 2.

PROBATE COURTS.

1. PROBATE AND DISTRICT COURTS MAY HAVE CONCURRENT JURISDICTION in certain cases. *Little v. Birdwell*, 242.
2. PROBATE COURTS OF RHODE ISLAND HAVE EXCLUSIVE JURISDICTION over the probate of wills, and the supreme court has no original jurisdiction to hear proof of a will or to allow it. *Olney v. Angell*, 62.

3. JURISDICTION OF PROBATE COURT OVER TESTAMENTARY AND PROBATE MATTERS IS NOT EXCLUSIVE. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains its jurisdiction. *Deek v. Gerke*, 555.
4. EFFECT OF DECREE PROVING WILL IS CONFINED TO TERRITORY, and things within the territory, of the state establishing the court by which such decree is rendered. And article 4, section 1, of the constitution of the United States, does not extend the operation of the probate of a will, as a judicial act of a state, beyond its own territory. "Full faith and credit" is given to such a decree when it is left where it is found, local in its nature and operation. *Olney v. Angell*, 62.
5. PROBATE OF WILL IN ANOTHER STATE IS ONLY PRIMA FACIE EVIDENCE OF ITS VALIDITY, upon an application to a probate court in Rhode Island to allow a copy thereof to be filed and recorded in the latter state. *Bowen v. Johnson*, 49.
6. SECTION 1 OF ARTICLE 4 OF CONSTITUTION OF UNITED STATES DOES NOT EXTEND OPERATION OF DECREE OF PROBATE COURT admitting a will to probate to things which were, at the time of the testator's death, without the territory of the state whose court has taken the probate. *Id.*
7. PROBATE COURT HAS POWER TO REVOKE PROBATE OF FORMER WILL upon a mere application to it to prove, or to allow to be filed and recorded, a later will of the same testator, as incidental thereto, and it is not necessary to institute a preliminary and separate proceeding for the purpose of such revocation before applying for the probate of such later will. *Id.*

PROCESS.

See INSANITY; SHERIFFS.

PROFITS.

See DAMAGES, 1, 2.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PUBLIC POLICY.

See NEGOTIABLE INSTRUMENTS, 2.

QUIS DAREIN CONTINUANCE.

See PLEADING AND PRACTICE, 7, 8.

PUNITIVE DAMAGES.

See DAMAGES, 3.

QUESTIONS OF LAW AND FACT.

See FRAUD, 4; RAILROADS, 5, 16.

QUIA TIMET.

See EQUITY, 15-19.

RAILROADS.

1. **RAILWAY COMPANY IS NOT LIABLE FOR MAKING ERECTIONS IN RUNNING STREAM**, where they are guilty of no want of proper care and skill, unless they directly affect the riparian owners. *Henry v. Vermont Cent. R. R. Co.*, 329.
2. **RAILWAY COMPANY IS LIABLE FOR MAKING ERECTIONS IN RUNNING STREAM**, where the riparian owner above is injured by the rise or flowing back of water, occasioned by such erections below him. This is a direct injury, and the company must guard against it. *Id.*
3. **RAILWAY COMPANY IS NOT LIABLE FOR MAKING NECESSARY ERECTIONS IN RUNNING STREAM**, though a riparian proprietor's land below has been gradually washed away by a change in the course of the current of the stream; and it makes no difference whether such erections have been made in a careless and unskillful manner or not. The injury is merely consequential, and one of those remote consequences which the law will not make the basis of action. *Id.*
4. **IN APPRAISEMENT OF DAMAGES FOR LOCATING RAILWAY ON ONE'S PREMISES**, every injury is included that the owner would suffer by the construction of the road in a reasonable manner, and its continuance with care and prudence. *Waterman v. Connecticut etc. R. R. Co.*, 326.
5. **PRUDENCE AND CARE MAY REQUIRE RAILROAD COMPANY TO KEEP OPEN DITCH** to prevent an accumulation of water on the land adjoining the track and owned by other parties, but it is a question of fact, and not of law. *Id.*
6. **RAILROAD COMPANY MUST EXERCISE UTMOST CARE AND DILIGENCE** to avoid running over person on their track. *East Tennessee etc. R. R. Co. v. St. John*, 149.
7. **RAILROAD COMPANY IS LIABLE TO OWNER OF SLAVE**, a negro boy eight years old, who is run over and killed while sleeping on the track; the engineer having failed to sound the whistle or check the speed of the train, and it is no excuse that when the boy was discovered the train could not have been stopped before reaching him, or that the whistle would not have alarmed him in time. *Id.*
8. **CONTRIBUTORY NEGLIGENCE IS NO DEFENSE WHERE NEGRO SLAVE EIGHT YEARS OLD** is run over and killed while sleeping on a railroad track, for the child is too young, and the master of the slave is not chargeable with negligence in not watching his negro slave children and keeping them away from the road. *Id.*
9. **RAILROAD STATION-HOUSE IS OPEN TO TRAVELING PUBLIC**, and any person desiring to go upon the cars has the right to go into such house at the proper time, and remain there until the departure of the train, whether he has purchased a ticket or not. *Harris v. Stevens*, 337.
10. **RIGHT TO ENTER AND REMAIN AT RAILROAD STATION-HOUSE MAY BE FORFEITED** by improper conduct of the person, or by his violation of the rules of the company, and then the company by its servants may remove him. *Id.*
11. **RIGHT TO ENTER AND REMAIN AT RAILROAD STATION-HOUSE** extends only so far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars, and as to what is a reasonable time will depend upon the circumstances of each particular case. *Id.*

12. RAILROAD COMPANIES HAVE NOT ONLY RIGHT TO ACT AS COMMON CARRIERS, but are bound to act as such. *Id.*
13. RAILROAD COMPANY MAY REMOVE FROM STATION-HOUSE ONE not intending to travel upon their road, if after request he refuses to depart. *Id.*
14. RIGHT TO REMAIN AT RAILROAD STATION-HOUSE DEPENDS ON INTENT of the party to take a train expected soon to leave, and, upon being requested to depart, should make known his intent to the person so requesting him. *Id.*
15. REPLICATION IN TRESPASS FOR REMOVAL FROM RAILROAD STATION-HOUSE should show that plaintiff was there intending to go upon a train that was expected to leave soon, but need not allege that plaintiff went to the station-house for the purpose of traveling on the cars. It is sufficient if such intent was formed after the entry and before the assault. *Id.*
16. IN ACTION AGAINST RAILROAD COMPANY FOR SETTING FIRE TO PLAINTIFF'S GROWING GRAIN by means of sparks escaping from its engine, where the proof shows that the result was not probable from the ordinary working of the engine, this establishes *prima facie* that negligence existed where there is no proof that the result happened from any unexpected or uncontrollable accident; and the matter should be left to the jury for them to determine the question of negligence or no negligence. This court will not review their finding. *Hull v. Sac. V. R. R. Co.*, 656.
17. RESIDENCE OF RAILWAY COMPANY, for purpose of bringing actions as plaintiff, is in the county or town upon the legally defined route of their road where their principal office and the center of their business operations is situated. This principle also applies to banks, manufacturing and steamboat companies; and to an ordinary partnership in fixing the place of its liability to taxation for personalty. *Connecticut etc. R. R. Co. v. Cooper*, 319.
18. RESIDENCE OF RAILWAY COMPANY IS LIMITED to the range of the legally defined route of their road, where their charter fixes no locality. And this principle applies to all other corporate companies. *Id.*
19. RAILROAD CORPORATION HAVING NO RESIDENCE IN CERTAIN COUNTY CANNOT THERE MAINTAIN SUITS against residents of other counties. *Id.*

See COMMON CARRIERS, 1; CORPORATIONS.

RATIFICATION.

See BAILMENTS, 4.

RECEIVERS.

WHERE RECEIVERS OF BANK bring suit in one state in their names as receivers, and at the same time institute suit in another state in the name of the bank, both suits involving the same cause of action, and being against the same defendant: *Held*, that the receivers having power by law either in their own names or in the name of the bank to commence and prosecute suits, in law or equity, on claims in favor of the bank, that a judgment recovered by them as receivers would have the same effect as if recovered in the name of the bank, and would bar the action in the other state. *Bank of North America v. Wheeler*, 683.

RECORDS.

1. JUDGES OF COURT MAY CONTROL ITS RECORDS so far as essential to the proper administration of justice, and this control is beyond the reach of legislation. *Houston v. Williams*, 565.
2. CLERK OF COURT, THOUGH CONSTITUTIONAL OFFICER, IS SUBJECT TO ORDERS OF COURT in regard to the control of its records. *Id.*
See BONA FIDE PURCHASERS; DEEDS, 3; EVIDENCE, 13-14.

REDEMPTIONS.

See EXEMPTIONS; MORTGAGES.

REFEREES.

1. UPON PENDING ACTION BEING SUBMITTED TO REFEREE, and the submission made a rule of court, plaintiff must proceed for the same cause of action named in his declaration. *Waterman v. Connecticut etc. R. R. Co.*, 336.
2. QUESTIONS OF VARIANCE BETWEEN DECLARATION AND PROOF ARE CONSIDERED AS WAIVED by reference, provided that the matter set up as the plaintiff's ground of recovery before the referee is that for which he sued. *Id.*
3. PLEADINGS BEFORE REFEREE.—Every matter which, by the rules of law, could properly have been introduced by way of amendment to the declaration will be considered to have been added, and its absence waived or cured by the reference. *Id.*

REFORMATION OF CONTRACTS.

See CONTRACTS, 3.

REGISTRATION.

See BONA FIDE PURCHASERS; DEEDS, 3.

REGULATIONS.

See BANKS AND BANKING, 1.

RELEASE.

See TRUSTS AND TRUSTEES, 1.

RENTS.

See CO-TENANCY, 6; EXEMPTIONS, 23, 24.

REPLICATIONS.

See RAILROADS, 15.

REPUTATION.

See SEDUCTION, 3; WITNESSES, 6-8.

RESCISSION OF CONTRACTS.

See SALES, 8.

RESERVATIONS.

See CO-TENANCY, 11, 12; DEEDS, 4.

RES GESTÆ

See EVIDENCE.

RESIDENCE

See CORPORATIONS, 19; RAILROADS, 17-19.

RETURNS

See EXECUTIONS, 11-12.

REVOCATION.

See LICENSES; REWARDS.

REWARDS.

1. **IN ACTION TO RECOVER REWARD OFFERED IN ADVERTISEMENT** for the arrest and conviction of the one who set fire to a certain house, such conviction having been effected, it cannot be urged that the agreement was a *nude pact*, the services being such as any good citizen is bound to perform. Plaintiff put himself to extraordinary trouble to procure the conviction, which it can hardly be said every good citizen is bound to do. *Ryer v. Stockwell*, 634.
2. **ADVERTISEMENT OFFERING REWARD IS CONTRACT.**—The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal on the part of the person making it to all persons, which any one capable of performing the service may accept at any time before it is revoked and perform the service; and such offer on one side, and acceptance and performance on the other, is a valid contract made on good consideration, which the law will enforce. *Id.*
3. **IN CASE OF ADVERTISEMENT OFFERING REWARD, UNTIL PERFORMANCE** the offer is a proposal merely, and not a contract, and may be revoked at the pleasure of him who made it. *Id.*
4. **AT WHAT TIME REWARD IS EARNED.**—Where a reward is offered for such information as will be sufficient to convict a criminal, a claim to the reward does not attach until the prisoner has been convicted, as the sufficiency of the information can only be determined by the event of the trial. The statute of limitations runs from this time. *Id.*
5. **ADVERTISEMENT OFFERING REWARD** for certain information, upon its being furnished, becomes a written contract, against which the statute does not run for four years. *Id.*

RIPARIAN PROPRIETORS.

See WATERCOURSE.

RIVERS.

See WATERCOURSE.

SALES.

1. **PURCHASER'S RIGHT TO REPUDIATE PAROL SALE OF GOODS MUST BE EXERCISED IMMEDIATELY** upon their delivery to him, or he will be regarded as having accepted them. *Spencer v. Hale*, 309.
2. **SALE OF NOXIOUS AND UNSOUND FOOD.**—Person engaged in business of furnishing provisions for market is bound to use ordinary prudence and care to avoid the sale of noxious and unsound food. *Hunter v. State*, 164.

3. **WORDS WHICH AMOUNT TO EXPRESS WARRANTY.**—The words “said negroes sound in body and mind,” in a receipt for money paid for negroes sold, amount to an express warranty of soundness of the slaves. *Kearly v. Duncan*, 180.
 4. **WHERE SALES OF GOODS ARE MADE BY SAMPLE, THERE IS IMPLIED WARRANTY** that the goods delivered shall correspond with the sample. *Brastley v. Thomas*, 264.
 5. **WHERE GOODS ARE SENT BY ONE MERCHANT UPON ORDER OF ANOTHER,** there is an implied warranty that the goods sent are such as were ordered; where goods are so sent without a special order, but upon a general engagement to forward goods, there is an implied warranty that all goods sent are valuable and merchantable. *Id.*
 6. **PURCHASER OF GOODS MUST ATTEND TO THOSE QUALITIES OF ARTICLES HE BUYS** which are supposed to be within the reach of his observation and judgment, such as where the articles are equally open to the inspection of both parties; but this rule does not apply where the purchaser has ordered goods of a certain character, and relies on the judgment of the seller, or where goods of a certain described quality are offered for sale, and when delivered do not answer the description given in the contract. *Id.*
 7. **DOCTRINE OF CAVEAT EMPTOR IS FOUNDED UPON IDEA THAT PURCHASER SEES WHAT HE BUYS,** and exercises his own judgment. Where he has no opportunity of exercising this judgment, but relies upon the judgment of the party with whom he deals, the tendency of the modern decisions is to imply a warranty of quality. *Id.*
 8. **RETURNING GOODS IN CASE OF BREACH OF WARRANTY.**—Where there is an express or implied warranty, the vendee of goods may show a partial failure of consideration, in defense of an action against him for the purchase money, without returning the goods; but if he would rescind the sale and recover back the purchase-money, he must within a reasonable time return the goods, or offer to return them; unless the goods are wholly worthless, in which case the vendee is never under obligation to either return or offer to return them. *Id.*
- See **AGENCY**, 3; **BAILMENTS**, 2; **EXHIBITIONS**; **JUDICIAL SALES**; **PARTNERSHIP**, 7, 15; **STATUTE OF FRAUDS**, 2; **VENDOR AND VENDEE**.

SCHOOLS.

See **COUNTIES**, 4.

SEDUCTION.

1. **TO SUSTAIN ACTION FOR SEDUCTION OF PLAINTIFF'S DAUGHTER,** it is not necessary to show that the defendant used deception, flattery, or false promises to accomplish his purpose; it is sufficient if the seduction resulted from the solicitation, importunity, or from any means or arts used by the defendant. *Reed v. Williams*, 157.
2. **IN ACTION FOR SEDUCTION, FEMALE CANNOT, IN TENNESSEE, BE INTERROGATED AS TO ACTS OF UNCHASTITY WITH OTHERS,** since in this state this would subject her to criminal punishment, though her general character for chastity is involved in the issue, and may be impeached by general evidence, and persons who have had criminal intercourse with her may be called to testify to the fact. *Id.*

3. **GENERAL EVIDENCE OF PLAINTIFF'S REPUTATION AS MAN OF PROFLIGATE PRINCIPLES** and dissolute habits is admissible in an action for the seduction of his daughter, but evidence of a particular fact in this respect is not admissible, such as that some time before the alleged seduction he had labored under the venereal disease. *Id.*

SEPARATE PROPERTY.

See **HUSBAND AND WIFE; MARRIED WOMEN.**

SERVICE.

See **PLEADING AND PRACTICE, 4.**

SET-OFF.

1. **PAYMENT OF DEBT NOT YET DUE CANNOT BE ENFORCED BY WAY OF SET-OFF** until it is due. *Hayes v. Hayes*, 709.
2. **LAW OF SET-OFF, AS APPLICABLE TO DEMANDS NOT DUE**, is the same in courts of equity as it is in courts of law. *Id.*
3. **LEGACY, NOW PAYABLE, CANNOT BE SET-OFF IN EQUITY** against legatee's debt to the estate not yet due. *Id.*

See **INJUNCTIONS, 2.**

SHERIFFS.

1. **SHERIFF IS BOUND TO USE REASONABLE DILIGENCE ONLY**, in the execution of process; what constitutes such diligence depends upon the particular facts, whether, for instance, the writ be for fraud, or because the defendant is about to leave the state, or remove his property, and the like. *Whitney v. Butterfield*, 584.
2. **WRIT PLACED IN SHERIFF'S HANDS ON SUNDAY IS NOT CONSIDERED OFFICIALLY RECEIVED** by him on that day, nor is it officially in his hands until Sunday has expired. *Id.*
3. **WHERE SHERIFF RECEIVES ONE WRIT OF ATTACHMENT ON SUNDAY**, and another against the same defendant is placed in the hands of a deputy at a quarter-past twelve on Monday morning, and without the sheriff's knowledge, and the first levy is made under the last writ at one o'clock on Monday morning, the sheriff is not guilty of negligence in executing the first writ, where no other special circumstances are shown why more diligence should have been used in executing the writ. *Id.*
4. **SHERIFF AND HIS DEPUTY ARE ONE PERSON IN LAW**, so far as to make the former responsible for the acts of the latter, but not so far as to require impossibilities of the sheriff, or to impose unconscionable exactions. And the mere omission of a deputy to inform the sheriff that he has process in his hands is not such negligence as to charge the sheriff in case a writ last in hand was executed first. *Id.*

See **ATTACHMENTS; EXECUTIONS.**

SHERIFFS' SALES.

See **EXECUTIONS.**

SHIPPING.

1. **MERE FACT THAT TWO PARTIES OWN CERTAIN INTERESTS IN BOAT DOES NOT OF ITSELF CONSTITUTE THEM PARTNERS.** *Donald v. Hewitt*, 431.

2. THERE MAY BE JOINT PROPERTY IN STEAMBOAT without the existence of a partnership. *Id.*
3. INDORSEMENT UPON ENROLLMENT OF BOAT is simply made for the purpose of giving notice of a pre-existing statutory lien, and is not designed to evidence the declaration of a new trust. *Id.*

SIDEWALK.

See TAXATION, 3.

SOVEREIGNTY.

STATE HAS POWER TO MAKE CONTRACT WHICH SHALL BIND IT IN FUTURE.
State v. Bank of Smyrna, 699.

See TAXATION.

STATUTE OF FRAUDS.

1. PROMISE OF ONE PARTY MADE TO ANOTHER, FOR BENEFIT OF THIRD PARTY, need not state the name of third party. It will be sufficient if he is in some measure designated as the person intended. *McCown v. Schrimpf*, 221.
2. DELIVERY OF GOODS TO, AND THEIR ACCEPTANCE BY, CARRIER NAMED BY PURCHASER is a sufficient receipt and acceptance to take the sale out of the statute of frauds. *Spencer v. Hale*, 309.

STATUTE OF LIMITATIONS.

1. LACHES OF BOTH PARTIES TO AGREEMENT may be so great that a court of equity will relieve neither one of them. *Walker v. Emerson*, 207.
2. STATUTE OF LIMITATIONS WILL NOT BEGIN TO RUN AGAINST NOTE PAYABLE IN STONE-WORK, to be done at any time called for, until such request is made. *Lincoln v. Purcell*, 196.
3. ACTION FOR DAMAGES FOR OVERFLOWING LANDS is barred in one year, under the Alabama statutes. *Roundtree v. Brantley*, 470.
4. VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY, UNDER PAROL EXECUTORY CONTRACT FOR SALE OF LAND, is not destroyed because the action at law to recover the purchase-money is barred by the statute of limitations. *Relfe v. Relfe*, 467.
5. LIEN IS PRESERVED, NOTWITHSTANDING BAR OF DEBT, THOUGH DEBT IS BY PAROL. *Id.*
6. PRINCIPLE THAT PRESERVES LIENS, NOTWITHSTANDING BAR OF DEBT, is that the statute of limitations does not extinguish the debt, but merely bars the remedy by action at law. *Id.*
7. BILL TO ENFORCE VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY OF LAND is not a stale demand if filed within twenty years. *Id.*
8. STATUTE OF LIMITATIONS WILL NOT COMMENCE TO RUN AGAINST SPECIFIC LIEN until the purchaser of the land upon which the lien is reserved disclaims the lien, and assumes to hold adversely to it, with the knowledge of the party having such lien. *Lincoln v. Purcell*, 196.
9. MERE LAPSE OF SEVEN YEARS BEFORE FILING BILL TO ENFORCE LIENS FOR PAYMENT OF MONEY DOES NOT, under the statutes of Tennessee, create a bar. Where the question concerns the character of defendant's possession, such possession must, in legal contemplation, be adverse; that

in, a cause of action must have existed for the full period of seven years before suit brought, which might have been asserted at any time within that period, in order to create a bar. *Id.*

10. WHETHER OR NOT NOTE HAS BEEN PAID IS QUESTION for the jury, and lapse of time so long as fourteen years is a circumstance which should be left to them in determining this question. Its production by the payee after this lapse of time does not rebut any presumptions arising from this circumstance. *Walker v. Emerson*, 207.

11. STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN in favor of a person who entered into the possession of premises under a contract for title, so as to constitute an adverse possession, until he has repudiated such contract, and claimed to hold in defiance of the title under which he entered, and the party under whom he entered has notice of such adverse holding. *Williams v. Chas*, 739.

See ADVERSE POSSESSION; REWARDS, 4, 5; VENDOR AND VENUE, 3; WATER-COURSES, 8.

STATUTES.

1. TITLE OF ACT—ONE OBJECT.—The title "An act to consolidate the Texas Monumental Committee and the Texas Military Institute with Rutersville College," embraces but one object within the meaning of the constitution. *Tadlock v. Eccles*, 213.

2. CONSTITUTIONAL PROVISION THAT ACT OF LEGISLATURE SHALL RELATE TO BUT ONE OBJECT, which shall be expressed in its title, only requires that the terms employed in the title of the act should be significant of the subject of its provisions. It does not mean that the word "object" should be understood in the sense of "provision," for that would render the title of the act as long as the act itself. Nor does it intend that no act of legislation shall be constitutional which has reference to the accomplishment of more than one ultimate end. *Id.*

3. WORDS USED IN STATUTE, WHICH HAVE WELL-KNOWN AND DEFINITE MEANING in the law, are to be given such meaning in construing the statute. *Harris v. Reynolds*, 600.

See CORPORATIONS, 22; EMINENT DOMAIN; EVIDENCE, 10; EXERCUTIONS, 23; FERRIES, 2; LIENS; MORTGAGES, 6-8.

STEAMBOATS.

See SHIPPING.

STOCK AND STOCKHOLDERS.

See CORPORATIONS; TAXATION, 13; TROVER.

STREAMS.

See WATERCOURSES.

STREETS.

See HIGHWAYS.

SUBSCRIPTIONS.

See CORPORATIONS.

SUNDAYS.

See SHERIFFS, 2, 3.

SUPREME COURTS.

See PROBATE COURTS, 2.

SURETYSHIP.

1. SURETIES OF ADMINISTRATOR ARE RESPONSIBLE FOR ASSETS of the intestate which were situated, at his death, in another state, but afterwards brought to Virginia, and there treated and held as assets by the administrator. *Andrews v. Avery*, 355.
2. SURETIES OF ADMINISTRATOR ARE DISCHARGED from liability for the proceeds of the sale of certain property of the intestate, but not required for the payment of debts, when such property is taken out of the hands of the administrator, and by a valid decree placed in his hands as "commissioner," to be sold, and the proceeds divided among the distributees. *Id.*
3. SURETY IS BOUND, THOUGH PRINCIPAL IS NOT, where the matter of defence in the hands of the principal is altogether of a personal character; such as infancy or coverture. In such a case the surety stands, in a certain sense, a principal promisor. *St. Albans Bank v. Dillon*, 295.
4. WHERE SURETY UNDERTAKES THAT PRINCIPAL SHALL DO SPECIFIC ACT, as that he will pay a judgment, the judgment against the principal is conclusive against the surety. No notice to the surety is required as he stipulated without regard to it. *Pico v. Webster*, 647.
5. SURETIES UPON OFFICIAL BONDS ARE NOT BOUND BY JUDGMENT against their principal in an action to which they were not parties. They undertake, in general terms, that the principal will perform his official duties, but do not agree to be absolutely bound by any judgment obtained against him for his official misconduct. They have a right to be heard, and to contest the question of their liability. *Id.*

See NEGOTIABLE INSTRUMENTS, 6-8, 15.

TAVERNS.

See INNS.

TAXATION.

1. CONSTITUTIONAL PROVISION THAT TAXATION SHALL BE EQUAL AND UNIFORM THROUGHOUT STATE has no reference to special assessments for local improvements, but applies only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the government of the state, or of some county or town. *Burnett v. Sacramento*, 518.
2. LEGISLATURE MAY PROVIDE FOR EXPENSES OF LOCAL IMPROVEMENTS, either by general taxation upon the property of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto and specially benefited thereby. *Id.*
3. COURT OF EQUITY WILL NOT ENJOIN COLLECTION OF GENERAL TAX or of a sidewalk tax of a city, on the mere ground that the tax was illegally assessed against the complainant, and that his real estate has been levied

upon, and is about to be sold for its payment, where no special equities are shown, and the law affords an adequate and more appropriate remedy. *Greene v. Mumford*, 79.

4. **PROCEEDING BY INJUNCTION IS PROPER MODE** by which to test the legality of a levy made by an officer under the supposed authority of a law the constitutionality of which is denied. *Myre v. Jacob*, 367.
5. **ALTHOUGH VIRGINIA CONSTITUTION PROVIDES** that taxes shall be equal and uniform, it is within the constitutional power of the legislature to impose a tax upon the transmission of estates by devise or descent, and prescribe the rate of the same. *Id.*
6. **VIRGINIA LEGISLATURE, BY ACT OF MARCH 2, 1854,** imposed a tax and fixed the rate thereof on estates transmitted by devise or descent; but at the subsequent session the legislature omitted to fix any rate on such tax in the tax law of March 18, 1856: *Held*, that the failure to fix a rate in 1856, without any repeal of previous laws prescribing the tax and fixing its rate, did not operate to release a tax accruing in 1855; and that the act of 1854 must remain in force until expressly repealed or replaced by other provisions plainly intended to be substituted in its stead. *Id.*
7. **TAKING POWER MAY SELECT ITS OBJECTS OF TAXATION,** and arrange the basis and the amount of taxes. *State v. Bank of Smyrna*, 699.
8. **EXEMPTION OF PROPERTY FROM TAXATION IS QUESTION OF POLICY,** and not of power. *Id.*
9. **TAXATION MAY BE LIMITED BY LEGISLATURE.** *Id.*
10. **STATE MAY MAKE VALID CONTRACT TO EXEMPT PROPERTY FROM TAXATION.** *Id.*
11. **CONTRACT BY STATE TO EXEMPT PROPERTY FROM TAXATION** will not be implied, but will be enforced when clearly expressed. *Id.*
12. **FRANCHISE OF CORPORATION MAY BE EXEMPTED FROM TAXATION BY CHARTER;** but this affords no such immunity beyond what is expressly stipulated in the charter. The franchise is one property and the capital stock another. *Id.*
13. **TAX ON BANK'S CAPITAL STOCK WILL NOT EXEMPT BANK FROM TAX IMPOSED ON ITS SURPLUS OR CONTINGENT FUND—CONSTRUCTION OF STATUTES.**—The Bank of Smyrna was incorporated under the legislative condition that the company should pay the state semi-annually at the rate of one half of one per cent per annum on the stock actually paid in, during the continuance of the charter. This provision, however, was repealed at the ensuing session of the legislature, and before the bank was organized. This repealing supplement or act provided that "in lieu of other taxes" the bank should pay a tax semi-annually at the rate of one fourth of one per cent on the whole of the capital stock actually paid in, during the continuance of the charter. By a subsequent act, a tax of one fourth of one per cent was imposed on seventy-five per cent of the surplus or contingent fund of the state banks generally. The words "in lieu of other taxes," contained in the supplemental act to the charter, were held not to exempt the bank from the payment of the last-mentioned tax imposed on its surplus, or contingent fund, by the general act of the legislature. It was also held that these words would not warrant the inference that the state thereby agreed not to impose any tax thereafter on this or any other property of the bank. The general act imposing the tax on the surplus or contingent fund of the state banks

- generally, so far as it related to the Smyrna bank, was also held constitutional, and the bank bound to pay it. *Id.*
14. **EXEMPTION OF PROPERTY OF CORPORATION FROM TAXATION** can last only during the continuance of the charter granting this immunity. And unless this exemption is expressed when the charter is renewed and extended, the power to tax will revive. *Id.*
15. **BANKING CORPORATION'S PROPERTY IS LIABLE TO TAXATION**, like the property of individuals, unless it is otherwise agreed upon in their charter; and such property consists in their franchise, or right to do banking business, within the limits of their charter; their capital invested in such business; their surplus earnings, set apart undivided; and such other property, real and personal, as they may be authorized to have. *Id.*
16. **LEGISLATURE HAS POWER TO BIND STATE BY CONTRACT** with corporation created by its charter not to tax for a given time the franchise or property of such corporation further than is agreed upon in the charter. *Id.*
17. **CHARTER PROVIDING THAT FRANCHISE OR PROPERTY OF CORPORATION SHALL NOT BE TAXED** for a given time, or further than agreed upon in the charter, is contract between the state and the corporators, which is inviolable under the constitution of the United States; and an agreement to limit or restrain the power of the state to impose further taxes on the franchise of a corporation during the continuance of its charter may enter into such a contract and have binding force. *Id.*
18. **BONUS IS PRICE PAID FOR FRANCHISE, OR POWER TO DO BANKING BUSINESS**, and may be measured by tax on capital stock, or by a specific sum stipulated; but unless otherwise stipulated and agreed upon in the charter, the payment of a price for a franchise no more exempts from taxation other property of the corporation, such as the surplus accumulation of earnings derived from that business while in its hands undivided, than it does the dividends in the hands of the stockholders, or the banking house, or any other real property which it holds. *Id.*

TELEGRAPH COMPANIES.

19. **TELEGRAPH COMPANIES ARE COMMON CARRIERS**, and are subject to the rules of law governing such carriers. *Parks v. Alta California Tel. Co.*, 589.
20. **ON BREACH OF CONTRACT TO DELIVER TELEGRAPHIC MESSAGE**, the telegraph company is liable, not only for the cost of sending the message, but for the natural and proximate damages resulting from the breach of contract. *Id.*
21. **WHERE TELEGRAPH COMPANY CONTRACTS TO SEND DISPATCH**, authorizing the sender's agent to secure a debt due by means of attachment, and by the negligence of the company in sending the dispatch the other creditors of the common debtor obtain the first attachment and exhaust the assets of the debtor, when if the company had properly performed its contract within a reasonable time the sender of the dispatch would have been enabled to make the amount of his debt, the company is liable for such natural and proximate damages as resulted from breach of the contract, which would include the amount of the debt. *Id.*

TELLERS.

See **BANKS AND BANKING, 2.**

TENANCY IN COMMON.

See **Co-TENANCY.**

TENANTS.

See **LANDLORD AND TENANT.**

TENDER.

See **COMMON CARRIERS, 6, 8, 9; PAYMENT.**

TIDE-WATERS.

See **WATERCOURSES.**

TIME.

See **CONTRACTS, 5; VENDOR AND VENUE, 11.**

TORTS.

See **AGENCY, 5; MARRIED WOMEN, 1; HUSBAND AND WIFE, 1; TRESPASS, TROVER; NEGLIGENCE.**

TRANSCRIPT.

See **EVIDENCE, 13, 14.**

TRESPASS.

1. **Co-TRESPASSERS ARE ALL EQUALLY LIABLE FOR INJURY DONE BY ONE OF THEM** in the prosecution of the common unlawful enterprise, and it is no defense for any one co-trespasser to say that the injury was greater than he intended, and that the particular act done was not contemplated or intended by him. *Kirkwood v. Miller*, 134.
2. **THREE PERSONS ARE JOINTLY LIABLE IN DAMAGES FOR ACT OF ONE OF THEM IN KILLING SLAVE**, where the three, fearing a rumored insurrection of slaves, seized and tied the slave without justifiable cause, and upon his attempting to escape all pursued him and one killed him, contrary to the intention of the other two. *Id.*
3. **PERSON IS NOT JUSTIFIED IN KILLING ANOTHER'S SLAVE** by mere rumors of an insurrection among slaves, but there must be facts implicating the slave in an actual insurrection. *Id.*
4. **PUBLICATION IN NEWSPAPERS ON SUBJECT OF APPREHENDED INSURRECTION AMONG SLAVES**, and other proof in that respect, not implicating the slave killed, is inadmissible in an action for damages for killing the slave. *Id.*
5. **CRIMINAL PURPOSE AND INTENT, EXPRESS OR IMPLIED, REQUIRED TO CONSTITUTE CRIME**, is not in all cases essential to an action for an injury to person or property. *Id.*
6. **DEFENDANT HAS RIGHT TO FORTIFY HIS TITLE AND CURE DEFECTS THEREIN** by any releases or conveyances which he can obtain at any time before trial of an action of trespass to try title. *Walker v. Emerson*, 207.

7. ACCORDING TO COMMON-LAW RULES, PARTIES NOT SUED IN ACTION OF TRESPASS cannot be brought in by mere notice where there is no pretense that they were trespassers. They must have legal notice, which is the notice required by statute, or make voluntary appearance as parties to the record. *Pico v. Webster*, 647.

See BAILMENTS, 5; INJUNCTIONS, 1; RAILROADS.

TROVER.

MEASURE OF DAMAGES FOR CONVERSION OF CERTIFICATE OF BANK SHARES is the full value of the shares. *Connor v. Hillier*, 105.

See ATTACHMENTS, 5, 20-22; BAILMENTS, 6, 7.

TRUSTS AND TRUSTEES.

1. LIABILITY OF TRUSTEE—ACKNOWLEDGMENT OF RECEIPT OF MONEY AS ESTOPPEL.—Where a naked trustee executes a release under seal, of a lien for the payment of money, in which he acknowledges the receipt of the money, he holds the money in trust and is liable for the same. And his acknowledgment estops him, both at law and in equity, from denying the fact of receiving the money. *Lincoln v. Purcell*, 196.
2. TRUST DEED, MORTGAGE, FORECLOSURE.—Where an instrument made to secure an indebtedness provides that a trustee shall sell the property mentioned in the instrument, and out of the proceeds pay the debt, it is a trust deed, and a judicial foreclosure and sale is not necessary. Decree of foreclosure and sale can only be based upon the contract of the parties, and in this case equity could not make such a decree as in case of a mortgage, without disregarding the express contract of the parties. *Koch v. Briggs*, 651.
3. IN CASE OF TRUST DEED, EQUITY WILL LIMIT ITS RELIEF to the contract made, and effectuate a sale only by enforcing the performance of the trust. *Id.*
4. TRUST DEED, MORTGAGE, FORECLOSURE.—Where defendant, being indebted to plaintiff upon a promissory note, conveyed certain land to a third person upon trust that if he failed to pay the note according to its tenor, the trustee was to advertise the property for sale, sell it at auction to the highest bidder, and out of the proceeds of the sale pay the note, the expenses of sale, etc., the instrument is a trust deed, and not a mortgage. It has no feature in common with a mortgage except that it was executed to secure an indebtedness, and the defendant's title may be divested as in the deed recited, and without a judicial foreclosure and sale. *Id.*

See CORPORATIONS, 18; CO-TENANCY, 3; COUNTIES; EQUITY, 6; EXERCUTIONS, 24; LIENS, 14, 17; NEGOTIABLE INSTRUMENTS, 3; POWERS; SHIPPING, 2.

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See COMMON CARRIERS, 3, 10.

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See PLEADING AND PRACTICE, 11; REFEREE, 2.

VENDOR AND VENDEE.

1. RELATION OF LANDLORD AND TENANT DOES NOT EXIST BETWEEN VENDOR AND VENDEE, and the vendee entering under void contract of sale may

buy in outstanding title superior to his vendor's, and rely upon it in ejectment or a bill in equity for possession prosecuted by the vendor. *Redmond v. Bowles*, 153.

2. **VENDOR UNDER VOID CONTRACT OF SALE, WHO PURCHASES OUTSTANDING PARAMOUNT TITLE**, is not liable to the vendor for the contract price less the amount necessarily expended for the better title, though he would have been so liable had the contract of sale been a valid one, even where the vendor had no title. *Id.*
3. **VENDOR UNDER EXECUTORY CONTRACT OF SALE DOES NOT HOLD ADVERSELY TO VENDOR**, and he cannot invoke the analogy of the statute of limitations, in the absence of a holding positively hostile to the vendor, to defeat a bill to enforce the vendor's lien. The same rule applies between vendor and vendee as between mortgagee and mortgagor. *Relfe v. Relfe*, 467.
4. **WHERE ONE IS IN POSSESSION OF REAL ESTATE UNDER BOND FOR TITLE**, and has given a note for the purchase-price, which he fails to pay, the obligor may either sue on the note and subject the land and other property to its payment, or he could eject the possessor from the land, unless the latter should bring the money into court and claim a specific performance of the agreement, he not having waived it otherwise than by failure in point of time of payment. *Walker v. Emerson*, 207.
5. **FAILURE OF OBLIGEE IN BOND FOR TITLE TO PAY PURCHASE-PRICE AGREED** does not absolutely and of itself put an end to the contract. *Id.*
6. **WHEN VENDEE AGREES AS PART PAYMENT OF PRICE "to release all mortgages" on the property**, he is answerable to the mortgagee personally on the debt, and the property is also subject to the mortgage. *McCown v. Schrimpf*, 221.
7. **LIEN CREATED BY CONTRACT, AND RESERVED ON FACE OF CONVEYANCE, IS REGARDED AS SPECIFIC LIEN; MORTGAGE AND VENDOR'S LIEN ARE DIFFERENT FROM SPECIFIC LIEN.** An express lien created by contract, and reserved on the face of the conveyance, is not, in all respects, equivalent to a mortgage, because the legal estate passes by the conveyance, and vests in the purchaser. It is also of different form, and possesses greater efficacy than the vendor's lien. The latter, where the legal estate has been conveyed, exists only by implication of law, and is the mere creature of a court of equity. It is in the nature of a trust only, and not a specific lien upon the land conveyed, until a bill has been filed to enforce it. A lien created by contract, and reserved on the face of the conveyance, is regarded as a specific lien, forming an original substantive charge upon the estate thus conveyed, and as affecting all persons who may subsequently come into possession of the estate with notice, either actual or constructive, of its existence. *Lincoln v. Purcell*, 196.
8. **IMPLIED LIEN OF VENDOR EXISTS, NOT ONLY AGAINST PURCHASER AND HIS HEIRS**, but also against all persons claiming under him with notice of it, though they be purchasers for a valuable consideration. This lien, however, does not exist against a *bona fide* purchaser without notice, nor prevail against a creditor who may have acquired a judgment or execution lien upon the property before a bill has been filed by the vendor to enforce his lien. *Id.*
9. **SPECIFIC LIEN, OR LIEN CREATED BY CONTRACT, WILL BE OPERATIVE AGAINST CREDITORS, bona fide purchasers, and all other persons, with-**

7. ACCORDING TO COMMON-LAW RULES, PARTIES NOT SUED IN ACTION OF TRESPASS cannot be brought in by mere notice where there is no pretense that they were trespassers. They must have legal notice, which is the notice required by statute, or make voluntary appearance as parties to the record. *Pico v. Webster*, 647.

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1. RELATION OF LANDLORD AND TENANT DOES NOT EXIST BETWEEN VENDOR AND VENDEE, and the vendee entering under void contract of sale may

buy in outstanding title superior to his vendor's, and rely upon it in ejectment or a bill in equity for possession prosecuted by the vendor. *Redmond v. Bowles*, 153.

2. **VENDOR UNDER VOID CONTRACT OF SALE, WHO PURCHASES OUTSTANDING PARAMOUNT TITLE**, is not liable to the vendor for the contract price less the amount necessarily expended for the better title, though he would have been so liable had the contract of sale been a valid one, even where the vendor had no title. *Id.*
3. **VENDOR UNDER EXECUTORY CONTRACT OF SALE DOES NOT HOLD ADVERSELY TO VENDOR**, and he cannot invoke the analogy of the statute of limitations, in the absence of a holding positively hostile to the vendor, to defeat a bill to enforce the vendor's lien. The same rule applies between vendor and vendee as between mortgagee and mortgagor. *Relfe v. Relfe*, 467.
4. **WHERE ONE IS IN POSSESSION OF REAL ESTATE UNDER BOND FOR TITLE**, and has given a note for the purchase-price, which he fails to pay, the obligor may either sue on the note and subject the land and other property to its payment, or he could eject the possessor from the land, unless the latter should bring the money into court and claim a specific performance of the agreement, he not having waived it otherwise than by failure in point of time of payment. *Walker v. Emerson*, 207.
5. **FAILURE OF OBLIGEE IN BOND FOR TITLE TO PAY PURCHASE-PRICE AGREED** does not absolutely and of itself put an end to the contract. *Id.*
6. **WHEN VENDOR AGREES AS PART PAYMENT OF PRICE "to release all mortgages"** on the property, he is answerable to the mortgagee personally on the debt, and the property is also subject to the mortgage. *McCown v. Schrimpf*, 221.
7. **LIEN CREATED BY CONTRACT, AND RESERVED ON FACE OF CONVEYANCE, IS REGARDED AS SPECIFIC LIEN; MORTGAGE AND VENDOR'S LIEN ARE DIFFERENT FROM SPECIFIC LIEN.** An express lien created by contract, and reserved on the face of the conveyance, is not, in all respects, equivalent to a mortgage, because the legal estate passes by the conveyance, and vests in the purchaser. It is also of different form, and possesses greater efficacy than the vendor's lien. The latter, where the legal estate has been conveyed, exists only by implication of law, and is the mere creature of a court of equity. It is in the nature of a trust only, and not a specific lien upon the land conveyed, until a bill has been filed to enforce it. A lien created by contract, and reserved on the face of the conveyance, is regarded as a specific lien, forming an original substantive charge upon the estate thus conveyed, and as affecting all persons who may subsequently come into possession of the estate with notice, either actual or constructive, of its existence. *Lincoln v. Purcell*, 196.
8. **IMPLIED LIEN OF VENDOR EXISTS, NOT ONLY AGAINST PURCHASER AND HIS HEIRS**, but also against all persons claiming under him with notice of it, though they be purchasers for a valuable consideration. This lien, however, does not exist against a *bona fide* purchaser without notice, nor prevail against a creditor who may have acquired a judgment or execution lien upon the property before a bill has been filed by the vendor to enforce his lien. *Id.*
9. **SPECIFIC LIEN, OR LIEN CREATED BY CONTRACT, WILL BE OPERATIVE AGAINST CREDITORS, bona fide purchasers, and all other persons, with-**

out regard to actual notice, where the conveyance reserving the lien has been properly recorded. *Id.*

10. PRESUMPTION OF LAW IS THAT PURCHASER OF LAND UPON WHICH SPECIFIC LIEN is reserved holds under and consistent with the lien until the contrary is shown by him. *Id.*

11. CONDITION OF CONTRACT FOR PURCHASE OF LAND, that party let into possession may purchase on payment of a certain sum of money, time not being of the essence of the contract, would entitle the party to make such payment within a reasonable time after the commencement of an action in ejectment. *Taylor v. Baldwin*, 736.

See ATTACHMENTS, 19; STATUTE OF LIMITATIONS, 4-8.

VERDICT.

See JURY AND JURORS; MORTGAGES, 10; NEW TRIAL; PLEADING AND PRACTICE, 13.

VESSELS.

See SHIPPING.

VOLUNTARY CONVEYANCES.

See FRAUDULENT CONVEYANCES.

WARRANTY.

See JUDICIAL SALES, 7, 8; SALES, 6-8.

WATERCOURSES.

1. WORD "NAVIGABLE" HAS TECHNICAL MEANING AT ENGLISH COMMON LAW, and is used to describe public rivers where the tide ebbs and flows. *Rhodes v. Ott*, 439.

2. ALL STREAMS BELOW TIDE-WATER ARE PRIMA FACIE PUBLIC. *Id.*

3. ALL STREAMS ABOVE TIDE-WATER ARE PRIMA FACIE PRIVATE. *Id.*

4. WHERE CREEK IS ABOVE TIDE-WATER, ONUS OF PROOF RESTS upon party claiming for it the character of a navigable stream. *Id.*

5. IF STREAM BE USEFUL AS COMMON PASSAGE FOR OR BENEFICIAL TO PUBLIC, or of sufficient depth for valuable floatage, or sufficiently large to bear boats or barges, or be of public use in transportation of property, it has the characteristics of a navigable stream. *Id.*

6. STREAM NEVER BEFORE USED FOR TRANSPORTATION, BUT USED IN SINGLE INSTANCE ONLY, for floating of timber only six or seven miles, is not a navigable stream. *Id.*

7. NO USE OF STREAM BY ONE PARTY ALONE, HOWEVER VALUABLE it may be to him, will make it a navigable stream, but public must be interested to constitute it as such. *Id.*

8. PLEA OF PRESCRIPTIVE RIGHT TO USE OF DITCH IN DRAINING DEFENDANT'S LAND presents no defense to an action for the overflowing of the plaintiff's land, caused by the formation of a dam in a stream from the washings of sand through the defendant's ditch; for the prescriptive right to the use of the ditch does not carry with it an easement of overflowing the plaintiff's land, since the sand bank causing the overflow may not have formed until some time within the period of prescription. *Rountree v. Brantley*, 470.

9. OWNER OF DAM MUST SO GOVERN AND CONTROL IT that injury will not result to his neighbors. *Fraser v. Sears Union Water Co.*, 562.
 10. WANT OF REASONABLE CARE BY PLAINTIFFS TO PREVENT INJURY IS NO DEFENSE to an action against the owners of a dam for damages caused by the negligent construction and use of the dam. *Id.*
 11. OBSTRUCTION OF NAVIGABLE RIVER IS PUBLIC NUISANCE. *S. O. R. R. Co. v. Moore*, 778.
 12. ACTION LIES FOR DAMAGES RESULTING FROM ACTUAL DETENTION OF PLAINTIFF'S BOAT when in the course of navigation, by reason of the erection of a bridge across the stream, but not for damages resulting from the general obstruction of the plaintiff's business; the only remedy in the latter case being an indictment as for a public nuisance. *Id.*
- See DAMAGES, 1; WATERCOURSES, 2; RAILROADS, 1-3; STATUTE OF LIMITATIONS, 2.

WILLS.

1. INSTRUMENT IN FORM, SUBSTANTIALLY, "I, A, OUT OF MY LOVE FOR MY SISTER B, do agree to make her my heir if she outlives me, and I, B, out of my love for my sister A, do agree to make her my heir if she outlives me," if properly attested and otherwise regular in form, is a will, and parol evidence to establish it as a will is admissible. *Evans v. Smith*, 751.
2. INSTRUMENT MAY BE WILL THOUGH IN FORM OF DEED if it is revocable at pleasure, not to take effect until the death of the maker, and properly attested and otherwise regular in form. *Id.*
3. WHERE QUESTIONS OF TITLE ARE INVOLVED, or the decision of the case brings in question the construction of a will, it is proper to invoke the jurisdiction of the district court. *Little v. Birdwell*, 242.
4. DIRECTION BY TESTATOR THAT HIS WILL SHALL BE DRAWN, containing the condition that it shall be valid only in the event of his death during his then sickness, and void if he should recover, must be complied with, and the condition inserted, and it will be held fraud if it is not so inserted; and no subsequent declaration by the testator that he is satisfied with the will, if thus deceived, operates to make it valid. *Vickery v. Hobbs*, 238.
5. WILL LIMITED IN ITS OPERATIONS BY CONDITIONS that defeat it before the death of the testator is void unless republished by the testator. *Id.*
6. IF WILL HAS BEEN DEFEATED BY ITS OWN LIMITED CONDITIONS, its mere possession and preservation by the testator until his death does not amount to a republication. *Id.*
7. ORAL TESTIMONY WILL NOT BE ADMITTED TO VARY OR CONTRADICT TERMS OF WILL which is properly drawn, and the contents of which are thoroughly understood by the testator. *Id.*
8. WHERE WILL IS DRAWN BY LEGATEE OR OTHER BENEFICIARY, closer scrutiny and stricter proof will be required than under ordinary circumstances that no fraud has been committed upon the testator, and that he is fully competent to make a will. *Id.*
9. PETITION TO SET ASIDE WILL should contain all the grounds necessary to effect that purpose, and other points brought out on the trial by proof should not be submitted by the judge to the jury. *Id.*

10. **IN CONSTRUCTION OF WILL, INTENTION OF TESTATOR** is the great object of inquiry, and this intention must not be defeated because he failed to clothe his ideas in technical language. *Bell County v. Alexander*, 268.
11. **QUANTITY OF INTEREST IN LAND CONVEYED BY WILL**.—Rules of the common law with respect to the quantity of interest conveyed by a will do not apply in Texas, where the statute provides that where an estate in lands is created by will it will be deemed to be an estate in fee-simple if a less estate be not limited by express words. *Id.*
12. **WORDS IN WILL TO PASS ESTATE IN LANDS—QUANTITY OF ESTATE PASSED**.—In a will, by employing the words "I wish the county in which I die and am buried to have and enjoy, for the benefit of public schools, two thirds of the land in the county I am buried in," taken in connection with the words "my land" and "the land I own," used in other parts of the will, show an intention on the part of the testator to devise an estate in lands, and there being no words limiting its quantity, will be held to convey an estate in fee-simple. *Id.*
13. **AT COMMON LAW, ESTATE IN LANDS CREATED BY WILL WILL BE ENLARGED TO AND HELD TO BE AN ESTATE IN FEE-SIMPLE**, where the land is charged with a trust which cannot be performed, or where the will directs an act to be done which cannot be accomplished, unless a greater estate than one for life be taken. *Id.*
14. **TESTATOR'S MEANING OF AMBIGUOUS WORDS IN WILL CANNOT BE SHOWN** by the testimony of the one who drew the will. *McAllister v. Tate*, 119.
15. **DEVISE TO ONE "IN FEE-SIMPLE FOR LIFE" PASSES ESTATE IN FEE**. *Id.*
16. **CONDITION IN WILL IN RESTRAINT OF MARRIAGE GENERALLY** is utterly void as against public policy, and the due economy and morality of domestic life. *Little v. Birdwell*, 242.
17. **WHERE CONDITION IN WILL IS NOT IN RESTRAINT OF MARRIAGE GENERALLY**, but is too rigid and restrains the choice unreasonably, it is utterly void. *Id.*
18. **WHERE USE OF PROPERTY BY WIDOW IS LIMITED BY WILL TO HER MARRIAGE**, such a limitation is not in restraint of marriage, and is valid. *Id.*
19. **CONDITION WILL BE HELD TO BE CONDITION SUBSEQUENT** if the act does not necessarily precede the vesting of the estate, but may accompany or follow it. *Bell County v. Alexander*, 268.
20. **WILL CONSTRUED TO CONFER LIFE ESTATE, WITH POWER OF DISPOSITION**. Where a testator bequeaths negroes to his wife, to be disposed of by her, with their increase, to the whole, or any one or more, of his children, as she may think proper, at her decease, the wife takes an estate for life, with power to dispose of the property to one or more of the children as she chooses; and her power is coupled with an interest as well as a trust. *Cruce v. McKee*, 186.
21. **WHERE DISCRETIONARY POWER IS NOT EXERCISED**, the whole of the objects who are within it will take in equal shares. So must it be in the disposition of a part where the power is not exercised as to the part. *Id.*
22. **TESTATOR'S CHILDREN WILL TAKE IN EQUAL SHARES PROPERTY** which has been bequeathed to his wife with a discretionary power of appointment, where she fails to exercise the appointment, or makes an invalid one. *Id.*

23. **POWER OF APPOINTMENT TO CHILDREN DOES NOT EMBRACE GRANDCHILDREN**, and the exercise of it in their favor is void. *Id.*
 24. **INVENTORY RETURNED IN PROBATE PROCEEDING** is to be deemed but *prima facie* evidence of title in the estate, which may be rebutted by proof that the title was not in the testator but in another. Legal right to show by proof true title does not depend upon the knowledge or ignorance of the state of the title by a party at the time of returning an inventory. *Little v. Birdwell*, 242.
 25. **WILL MADE IN ANOTHER STATE BY ONE DOMICILED THERE MUST BE FILED AND RECORDED IN PROPER PROBATE COURT IN RHODE ISLAND** before it can be allowed to operate upon property in the latter state. *Olney v. Angell*, 62.
- See **EXECUTORS AND ADMINISTRATORS; POWERS; PROBATE COURTS; SET-OFF, &**

WITNESSES.

1. **PERSONS OF MIXED BLOOD, FROM NEGROES OR INDIANS down to the third generation**, are not competent witnesses against white persons, under the Alabama statute, and there must have been one white ancestor of each generation for three generations before a competency to testify can be established. *Dupree v. State*, 422.
2. **WHERE PARTY COLLECTS MONEY FROM GARNISHEE**, he is not so interested as to incapacitate him from giving testimony, in a subsequent suit against the garnishee, as to the payment of the judgment. *Gunn v. Howell*, 484.
3. **COMPETENCY AS WITNESSES OF PERSONS NOT PARTIES TO RECORD** is presumed until the contrary appears, and the onus is upon the objector to show the incompetency. It is not enough that a mere probability of incompetency should be raised; the facts upon which it depends must be fairly established. *Johnson v. Lightsey*, 450.
4. **PILOT IN CHARGE OF BOAT AT TIME OF ACCIDENT IS COMPETENT WITNESS FOR CARRIER** in an action against him for damages to goods, unless it is affirmatively shown that the act of negligence that caused the injury to the goods rendered the pilot liable to the carrier. *Id.*
5. **OPINIONS OF WITNESSES WHO TESTIFY THAT THEY ARE ACQUAINTED** with the effect which privies and sties have upon the air about them, that they have examined the premises as to their nature and condition, are competent evidence as to whether or not such privies and sties are nuisances, and whether they must or would make plaintiff's house uncomfortable. *Kearney v. Farrell*, 677.
6. **ACQUAINTANCE WITH PRISONER FOR EIGHT OR TEN YEARS QUALIFIES ONE TO TESTIFY AS TO HIS CHARACTER**. *Dupree v. State*, 422.
7. **RESIDENCE IN IMMEDIATE VICINITY OF PERSON WHOSE CHARACTER IS SUBJECT OF INVESTIGATION** is not an indispensable qualification of witness to testify as to character. *Id.*
8. **INQUIRY IN IMPRACHING WITNESS INVOLVES HIS WHOLE MORAL CHARACTER**, and is not restricted merely to his general reputation for truth and veracity. *Gillian v. State*, 161.
9. **IMPRACHING WITNESS MAY PROPERLY BE QUESTIONED** as to whether he knows the general reputation of the person whose credibility is in question, what that reputation is, and whether from such knowledge the witnesses would believe him upon his oath. *Id.*

10. TESTIMONY OF WITNESS MAY BE IMPRACHED BY PROVING DECLARATIONS of party, where witness he was, that the witness had made a statement contradictory to that made by him upon the stand. *Allen v. Harrison*, 302.
11. RULE CONCERNING LEADING QUESTIONS IS AS STRINGENT EXAMINING WITNESSES CALLED TO IMPRACH WITNESSES as it is respecting other witnesses. *Allen v. State*, 760.

See ATTORNEY AND CLIENT, 1, 2.

WORDS AND PHRASES.

See DEEDS, 2; EXHIBITIONS, 23; STATUTES, 3; WATERCOURSES, 1; WILLS.

WRIT OF ERROR.

See PLEADING AND PRACTICE.

WRITS.

See ATTACHMENTS; EXHIBITIONS; SUBPOENAS.

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